

91-635

No. _____

Supreme Court, U.S.

FILED

OCT 15 1991

CLERK OF THE CLERK

In The
Supreme Court of the United States
October Term, 1991

— ♦ —
DOROTHY DILLER,

Petitioner,

v.

SELVIN AND WEINER,
a Professional corporation,

Respondent.

— ♦ —
Petition For A Writ Of Certiorari
To The Court Of Appeal Of The
State Of California, Second Appellate
District, Division Seven

— ♦ —
PETITION FOR A WRIT OF CERTIORARI

— ♦ —
THEODORE A. COHEN
12100 Wilshire Blvd.
Suite 1600
Los Angeles, CA 90025
(213) 447-6110

*Attorney for Petitioner
Dorothy Diller*



QUESTIONS PRESENTED

In a marital dissolution case, the trial court heard and decided the disputed issue of attorneys fees *between a lawyer and his own client* within the very same proceeding for which the lawyer had been employed by the client. The trial court had insisted that the petitioner hire independent counsel to represent her with respect to the attorneys fees issue. However, after the client hired independent counsel and the trial court promised that such counsel could participate, it refused to permit either the client or such independent counsel to participate in the hearing on attorneys fees, and it ordered judgment for the client's original attorney and against the client for over 1.5 million dollars.

The questions presented are as follows:

1. Whether the trial court's refusal to permit the client and/or her independent counsel to participate at trial on the issue of attorneys fees, especially after promising such participation, deprives her of a meaningful opportunity to be heard and denies her due process?¹
2. Whether due process of law prohibits an attorney from stepping out of his fiduciary role temporarily to obtain a judgment for his own benefit against his client who is for the time being unrepresented and disabled from presenting any defenses and offsets?

¹ We shall herein demonstrate that the decision of the California Court of Appeal conflicts with opinions of this Court and with decisions of other states on the very same issue.

QUESTIONS PRESENTED – Continued

3. Whether attorneys, who are bound by the highest fiduciary standards toward their client, should be the sole group allowed to escape scrutiny with respect to the fees they charge their own clients by being awarded fees in a non-adversarial proceeding?

4. Whether the construction by the California courts herein below of California Civil Code Sections 4370 and 71, not only conflicts with other jurisdictions and within California itself, but also, if left standing would constitute a constitutional deprivation of due process?

LIST OF PARTIES

The parties to the proceedings below included the petitioner herein, Dorothy Diller, and the respondent herein, Selvin and Weiner, a Professional Corporation. Stanley Z. Diller was a separate appellant/petitioner and Robinson, Robinson and Phillips was a separate respondent in the courts below on virtually the same issues that are presented herein, in that like petitioner here, Stanley Z. Diller appealed an award of attorneys fees in favor of his own attorneys, Robinson, Robinson and Phillips. Daniel E. Lungren, Attorney General of the State of California, is hereby listed because 28 U.S.C. § 2403(b) may be applicable.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED.....	i
LIST OF PARTIES	iii
OPINIONS BELOW	1
JURISDICTION	2
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED.....	2
STATEMENT OF THE CASE	3
<i>How the Federal Question Was Raised</i>	3
<i>Facts Material to the Consideration of the Questions Presented</i>	5
REASONS FOR GRANTING THE WRIT	18
I. BY PRECLUDING A CLIENT'S PARTICIPATION IN A HEARING WHICH RESULTS IN JUDGMENT FOR FEES IN FAVOR OF AN ATTORNEY AND AGAINST HIS OWN CLIENT AFTER SUCH PARTICIPATION WAS PROMISED BY THE TRIAL COURT, THE DECISION BELOW CONFLICTS WITH DUE PROCESS PRINCIPLES ENUNCIATED BY THIS COURT.....	20
II(a). BESIDES A CONFLICT WITHIN THE CALIFORNIA COURT SYSTEM ITSELF, AT LEAST TWO STATE COURTS HAVE ISSUED DECISIONS WHICH CONFLICT DIRECTLY WITH THE DECISION BELOW SANCTIONING THE PRECLUSION OF A CLIENT'S PARTICIPATION IN A HEARING UPON WHICH AN AWARD OF ATTORNEY FEES WILL BE MADE IN FAVOR OF HIS OWN COUNSEL.....	23

TABLE OF CONTENTS – Continued

Page

II(b).	IN ORDER TO UPHOLD THE CONSTITUTIONAL DUE PROCESS VALIDITY OF THE PROCEDURES SET FORTH IN CALIFORNIA CIVIL CODE 4370 AND 4371, A LITIGANT'S RIGHT TO INDEPENDENT COUNSEL THEREIN SHOULD BE FOUND AND CONSTRUED BY THIS COURT. THE STATUTE IS SILENT THEREON AND THEREFORE THE BASIC RIGHT OF REPRESENTATION CAN BE READILY IMPLIED.....	26
III.	THE APPEARANCE OF IMPROPRIETY RESULTING FROM THE PROCEDURE BELOW AND THE NATIONWIDE INTEREST IN ATTORNEY-CLIENT FEE DISPUTES, AMONG OTHER ITEMS OF IMPORTANCE SET FORTH HEREIN, MAKE THE QUESTIONS PRESENTED OF SUBSTANTIAL IMPORTANCE.....	27
CONCLUSION		30

TABLE OF AUTHORITIES

Page

CASES:

<i>Bardar v. Perrazzo</i> , 157 NYS 886 (1916).....	26
<i>Boddie v. Connecticut</i> , 401 U.S. 371 (1971)	22
<i>Bounds v. Smith</i> , 430 U.S. 817 (1977).....	21
<i>Coe v. Armour Fertilizer Works</i> , 237 U.S. 413 (1915)	22
<i>Countryman v. Countryman</i> , 135 Ariz. 110, 659 P.2d 663 (App. 1983).....	24, 28
<i>Dickinson v. Dickinson</i> , 631 S.W.2d 61 (Mo.App. 1982).....	23
<i>Fuentes v. Shevin</i> , 407 U.S. 67 (1972).....	22
<i>Goldberg v. Kelly</i> , 397 U.S. 254 (1970)	21
<i>Green v. McElroy</i> , 360 U.S. 474 (1959)	21
<i>Hawk v. Olson</i> , 326 U.S. 271 (1945).....	22
<i>House v. Mayo</i> , 324 U.S. 42 (1945).....	22
<i>In re Marriage of Hopkins</i> , 74 Cal.App.3d 591, 141 Cal.Rptr. 596 (1977).....	13
<i>In re Marriage of Jafeman</i> , 29 Cal.App.3d 244, 105 Cal.Rptr. 483 (1972).....	13, 25
<i>In re Marriage of Pagano</i> , 181 Ill.App.3d 547, 130 Ill.Dec. 331; 537 N.E.2d 398 (1989)	24
<i>In re Marriage of Pitulla</i> , 141 Ill.App.3d 956, 96 Ill.Dec. 276, 491 N.E.2d 90 (1986)	18, 24
<i>In re Marriage of Tushinsky</i> , 203 Cal.App. 3d 136, 249 Cal.Rptr. 611 (1988).....	13, 25

TABLE OF AUTHORITIES – Continued

Page

<i>Israel v. Zanesville and O.R. Co.</i> , 10 Ohio Dec Reprint 219, 19 WL Bull 258 (1888).....	26
<i>Joint Anti-Fascist Refugee Committee v. McGrath</i> , 341 U.S. 123 (1951).....	29
<i>Keister v. McDavid</i> , 76 A.2d 776 (Dist.Col. 1950).....	26
<i>Kerling v. G.W. Van Dusen and Co.</i> , 109 Minn 481, 124 N.W. 235 (1910)	26
<i>Kremer v. Chemical Construction Corporation</i> , 456 U.S. 461 (1982).....	22
<i>Marriage of Marks</i> , 758 P.2d 257 (Kan.App. 1988).....	23
<i>Mullane v. Central Hanover Bank and Trust Co.</i> , 339 U.S. 306 (1950).....	21
<i>Powell v. State of Alabama</i> , 287 U.S. 45 (1932)	20
<i>Snaidach v. Family Finance Corporation of Bay View</i> , 395 U.S. 337 (1969).....	22
<i>Vallie v. Lutz</i> , 269 S.W. 947 (Mo. 1925).....	26
<i>Wong v. Superior Court</i> , 246 Cal.App.2d 541, 54 Cal.Rptr. 782 (1966).....	<i>passim</i>

CONSTITUTIONAL PROVISIONS, AMENDMENTS, STATUTES:

California Civil Code Section 4370	3
California Civil Code Section 4370.5.....	12, 13
California Civil Code Section 4371	3, 28
9 Uniform Marriage and Divorce Act, Section 313	28

TABLE OF AUTHORITIES – Continued

	Page
28 U.S.C. Section 1257(a).....	2
United States Constitution, Amendment XIV, Section 1.....	2
 MISCELLANEOUS:	
7 Cal.Jur (3d Ed. 1989) Attorneys at Law, Section 82	25
C.E.B. <i>California Marital Dissolution Practice</i> (1983) Section 21.24.....	24
16 CJS section 96b.....	27
1985 Law Revision Commission Comment to Civil Code Section 4370.5.....	12, 13
3 Macaulay, <i>History of England from the Accession of James the Second</i> (London, 1855).....	29
5 <i>The Writings and Speeches of Daniel Webster</i> , 163	28
5 <i>Wigmore on Evidence</i> (3d Ed. 1940) Section 1367	21

No. _____

— ♦ —
In The
Supreme Court of the United States

October Term, 1991
— ♦ —

DOROTHY DILLER,

Petitioner,

v.

SELVIN AND WEINER,
a Professional corporation,

Respondent.

— ♦ —
**Petition For A Writ Of Certiorari
To The Court Of Appeal Of The
State Of California, Second Appellate
District, Division Seven**
— ♦ —

PETITION FOR A WRIT OF CERTIORARI
— ♦ —

The petitioner Dorothy Diller respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Court of Appeal of the State of California, Second Appellate District, Division Seven, entered in the above-entitled proceeding on May 3, 1991.

OPINIONS BELOW

On May 3, 1991, the Court of Appeal of the State of California, Second Appellate District, Division Seven, issued its opinion and affirmed the order of the trial court for attorneys fees and costs. The Court of Appeal opinion, in its case number B035205, has not been reported, and it is printed in Appendix A.

Petitioner petitioned the Supreme Court of the State of California for review. On July 17, 1991, the Supreme Court of the State of California denied the petition. The decision has not been reported, and it is reprinted in Appendix B.

The trial court's "Further Judgment on Reserved Issues" has not been reported. It is reprinted in Appendix C.

JURISDICTION

On May 3, 1991, the Court of Appeal of the State of California, Second Appellate District, Division Seven, issued its opinion and affirmed the order of the trial court for attorneys fees and costs. The Court of Appeal denied a timely petition for rehearing on May 31, 1991.

The Supreme Court of the State of California entered its order denying review in this matter on July 17, 1991.

During the proceedings in the lower courts and again in the Supreme Court of the State of California, Petitioner had properly drawn in question the "questions presented" within this petition with respect to the award of attorneys fees in favor of an attorney and against his own client in the same proceeding in which the attorney was representing the client.

The jurisdiction of this Court is invoked under 28 U.S.C. Section 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Amendment XIV, Section 1:

" * * * No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction equal protection of the laws."

*California Civil Code Sections:*²

Section 4370:

"(a) During the pendency of any proceeding under this part, the court may order any party * * * to pay such amount as may be reasonably necessary for the cost of maintaining or defending the proceeding and for attorneys' fees * * * *

Section 4371:

When the court orders one of the parties to pay costs and attorneys' fees for the benefit of the other party, such costs and fees may, in the discretion of the court, be made payable in whole or in part to the attorney entitled thereto * * * *

STATEMENT OF THE CASE

How the Federal Question Was Raised:

At the trial court below petitioner first raised the due process questions presented in the within petition by her independant counsel's "Memorandum of Legal Argument in Regard to 'Attorneys Fee' Issues," stating:

"GRANTING OF THE MOTION FOR ANY FEES WITHOUT A FULL EVIDENTIARY HEARING WOULD BE A VIOLATION OF DUE PROCESS."

The trial court made the attorneys fees issue "a disputed issue with separate representation for [each client] on the issue" (Reporter's Transcript ("RT") 4450-4451) and promised a hearing with "examination of anybody by Weiner [petitioner's original counsel], Saul [petitioner's independent counsel]. . . ." RT 4926.

However, on January 8, 1988, the date set for this adversarial hearing on the final attorney fee awards, the court, without explanation, changed its mind and prohibited independent counsel from participation, stating:

"The objections of Mr. Saul and Mr. Anteau to the court's interim order for attorney's fees is rejected.

² The full text of each of the following sections is reprinted in Appendix D.

The court does not intend to permit Mr. Saul or Mr. Anteau to participate in this proceeding concerning attorney's fees. . . . The only purpose of this hearing is to hear evidence. . . . *The issue in this case at this moment is primarily, what are the Petitioner's attorney's fees and who should pay them?*" RT 4931-4932.

"Mr. Saul, I am not going to hear you. There is no way that you can – if you want to get up and leave, fine. . . . I see no reason for you or Mr. Anteau to stay; but this is a public hearing, and you are entitled to stay. . . . *This is just an evidentiary proceeding on [the attorney fees issue].*" RT 4933, 4934.

The "hearing" then proceeded with only counsel who had a conflict of interest participating in a perfunctory manner and neither with any incentive to truly question the reasonableness of the fees sought by the other.

The questions presented here were again raised by petitioner in her appeal to the Court of Appeal of the State of California. The following two paragraphs of the Court of Appeal's opinion demonstrate that it considered and expressly rejected the federal constitutional claims:

(1) "Petitioner and respondent both contend that the portions of the judgment they appeal from should be reversed because the trial court allegedly denied due process of law by determining the amounts of fees and costs which it awarded based upon their attorneys' written declarations and supporting documentation and without permitting them to have their independent counsel cross-examine their attorneys to adopt this argument would establish a rule that in every dissolution action where attorney fees and costs are in issue their would be a trial within the trial requiring additional counsel to cross-examine the trial counsel regarding his or her attorney fees and that an attorney would always have a conflict with his client when the court is asked to set and allocate attorney fees." Appendix p. 17.

(2) "Although the attorney fees and costs are extremely high and this writer is concerned that they taint the quality of the system, the parties by their actions and conduct caused this aberration and under the circumstances the services performed by the attorneys was necessary and the fees and costs reasonable. The parties were afforded due process in the setting of the fees by the court." Appendix pp. 20-21.

The questions presented here were again raised in the Petition for Review filed in the Supreme Court of California.

Facts Material to the Consideration of the Questions Presented:

The instant proceedings involve a dispute with counsel in the marital dissolution proceeding between Stanley Z. Diller and the instant petitioner Dorothy Diller.

That serious conflicts of interest existed between the parties and their counsel became evident early in the proceedings and continued throughout. Because the existence of the conflicts and the extent thereof are crucial to a determination of the issues raised in this petition, some extensive quotations from the record are necessary. On the very first day of trial (August 3, 1987), the following colloquy occurred between the trial court and Mr. Weiner, counsel for wife:

"MR. WEINER: I have asked Mrs. Diller to consider retaining another counsel in whom she does have more trust and confidence than myself, I think that given the circumstances in the case that it may be appropriate for me to withdraw and for her to get other counsel in whom she does have more confidence.

THE COURT: No way. No way. It's not going to happen. . . . We're going to trial and I'm not going to let you out, period.

MR. WEINER: Well, I think it's important not just to make a record, but Mrs. Diller understands that it may be in her interest to seek and obtain other counsel so that she does have counsel in whom she does have confidence." RT 701-702

Throughout the trial the court was repeatedly alerted to the growing conflicts between the parties and their counsel and the potential for disagreement between the parties and their counsel regarding attorney's fees.

On September 14, 1987, counsel for husband advised the court of his desire to withdraw as counsel for husband (RT 1634). On September 21, 1987 the court denied this request (RT 1638, 1640), but such counsel filed a motion requesting the court to retain jurisdiction over fees and declared that husband had discharged Mr. Robinson as his attorney of record (CT 176-182).³

On September 28, 1987, during discussions regarding a procedure for shortening trial, Petitioner Dorothy Diller expressed her interest in obtaining independent counsel, stating in a colloquy with the Court:

"MRS. DILLER: [I] would like to speak with outside -

THE COURT: I want you to speak to - to get some outside legal advice. When do you think you're going to do that?

MRS. DILLER: I would expect within the next couple of days, Your Honor." RT 1656.

Later, on October 6, 1987, the court again acknowledged a conflict between wife and her attorney on the question of attorney's fees:

"THE COURT: . . . [T]he cost of the quest of finding concealed funds or to find misdeeds has far exceeded what ever would be found. . . .

I am aware at least as of today that there is some difference between you and Mr. Weiner about how this case is being handled, and I'm sorry for both of you.

* * *

³ In his declaration in support of the motion for fees, Mr. Robinson stated that Mr. Diller had discharged him as his attorney of record. CT 182.

I suspect that you are getting advice of some sort -- from some source that will suggest that when this case is over with there will be a future dispute with your lawyers." RT 1710-1711.

And with respect to the attorney fees issue and the problems between Petitioner and her counsel, Mr. Weiner, the Court stated:

"[T]he court will hear testimony -- the court is going to hear testimony about litigation costs. That's a major issue in this case. And that's going to take a couple of days. . . ." RT 1724.

* * *

"I am sorry that you have . . . allowed your relationship with Mr. Weiner to get where it is because that may present problems to you, although I'm going to try to prevent them from being problems." RT 1727

Following urging from the court, the parties entered into a stipulation intended to reduce the length of the trial.⁴ In discussing the proposed stipulation the court specifically assured Mrs. Diller that the issue of attorney's fees would not receive short shrift in an abbreviated trial by stating:

"And then, in another major issue, the court will hear testimony. . . . about litigation costs. That's a major issue in this case. And that's going to take a couple of days. There's going to be some depositions." RT 1724.

Prior to the execution of the October 19, 1987 stipulation the court also stated:

⁴ The stipulation provided that the court could receive testimony and other evidence concerning attorney's fees and costs, the reasonable value thereof, *the necessity thereof*, etc. The stipulation further provided that the court will permit each side one and one-half (1 1/2) days on this issue after depositions had been taken of each counsel (not to exceed three hours each) and appropriate documentation filed setting forth the *direct testimony of each attorney in connection with such claims for attorneys fees and costs*. The stipulation further provided that "*The bulk of the court testimony is contemplated as cross examination of a particular declarant.*" CT 200, lines 16-27.

"I do not intend, if we use the abbreviated method, to foreclose anyone from putting on any evidence that they want." RT 1746.

On December 2, 1987 the conflict between Mrs. Diller and her counsel which led to the necessity of Mrs. Diller obtaining independent counsel exploded in open court. The following colloquy occurred:

"THE COURT: Are you saying that you didn't have an opportunity to ever discuss these [privilege] matters with Mr. Weiner?

MRS. DILLER: No, he never discussed it with me.

THE COURT: Did he offer to discuss it with you last night?

MRS. DILLER: No, Sir.

THE COURT: Did he offer to discuss it with you this morning?

MRS. DILLER: No, Sir.

THE COURT: What have you been doing all morning, Mr. Weiner?

MR. WEINER: Your Honor, with all due respect to Mrs. Diller, I have attempted to discuss with Mrs. Diller this and other things yesterday at the conclusion. And she simply indicated that she wasn't in the mood to discuss them.

MRS. DILLER: No, sir, you did discuss with me and then you left. You kept me here until 5 o'clock. You didn't discuss the memos.

THE COURT: What about this morning?

MR. WEINER: This morning, your Honor, I approached Mrs. Diller. I wanted to discuss it with her.

MRS. DILLER: No, you didn't. . . . He got \$600,000 from me. Am I putting pressure on Mr. Weiner, or is Mr. Weiner putting pressure of me? *He has the deed to my house.*" RT 4128-4129; emphasis added.

The discussion continued with the court later urging wife to retain independent counsel. When the court indicated that it

wanted to inquire into the matter of fees to Arthur Young and Company for auditing and accounting fees, Petitioner interjected:

"MRS. DILLER: And Mr. Weiner's outrageous fees."

Then the following colloquy took place:

"THE COURT: I tell you, and I will tell this to Mr. Diller. I don't know who made this case go on as long as it has gone on. I get it from you that you think it's Mr. Weiner's fault. *I cannot allow Mr. Weiner to be - to get off this case.* But you have a potential in this case of having to pay over a million dollars still in . . . in fees, including attorney's fees and other litigation costs. You have that potential obligation. *Now if you want to get another lawyer to advise you about that or if you think you should get another lawyer, or if you want to get another lawyer, you better do it. I'm talking about over a million dollars.*

Mrs. Diller, I think you better get another lawyer.

MRS. DILLER: *I don't want another lawyer.*

THE COURT: *I think you better. You're talking about having to pay a million dollars more than what you already paid."* RT 4131, 4132, 4133; emphasis added.

The Court concluded:

"THE COURT: *It is clear now to you that I have told you that you should get another lawyer to help you, at least as far as the fees and costs are concerned.*

Isn't that clear to you?

MRS. DILLER: I have to get another lawyer?

THE COURT: I didn't say you have to. I'm telling you that you should." RT 4135; emphasis added.

Later on December 2, 1987 counsel for wife acknowledged the antagonistic relationship between himself and his client with regard to attorney fees, and with regard to the issue of whether she would waive the attorney-client privilege to permit her prior attorney, Alan Sigel, to testify that the matter was ready for trial at the time that he was substituted out:

"MR. WEINER: I met again with Mrs. Diller at this last break in the jury room and she has reaffirmed what she told me before, and that is that she's prepared to waive the privilege. I think it probably would be better if Mrs. Diller would stand up and indicate to the court what her intentions are because *I certainly am not in a position, given what I view if not a potential or real adversarial relationship that I have with my client and her advisers at this point, I am not in a position to -*

THE COURT: I would like to comment on that. I cannot believe that there is an adversarial relationship between [counsel] and Mrs. Diller and your representation of her in all aspects of this case *except as it pertains to litigation costs.*

MR. WEINER: *I meant, your Honor, with respect to the fees and costs issue. I think that it wouldn't be accurate to characterize the relationship as adversarial with respect to the others. I would say that it's a strained and difficult relationship with respect to the other matters.*

THE COURT: [Y]ou are prepared to waive the attorney-client privilege and allow Mr. Sigel to testify as to certain events . . . *particularly as it pertained to the state of preparedness or the state of readiness in re the Marriage of Diller to go to trial in April and May of last year?*

MRS. DILLER: Yes.

* * *

THE COURT: Mr. Weiner, you spoke to Mrs. Diller at the recess I took, which is almost 25 minutes ago, *and are you prepared to join in the waiver?*

MR. WEINER: *I am not, Your Honor.*

THE COURT: *It makes it even more complicated, but I accept it.*" RT 4180, 4185; emphasis added.⁵

Thus it came to pass that on the afternoon session of December 4, 1987, the court confirmed wife's retention of separate counsel:

⁵ This last statement by Mr. Weiner, wherein he refused to join in Petitioner's waiver of the attorney client privilege with respect to her last counsel in order that prior counsel Mr. Sigel be able to testify as to whether the matter was ready to proceed to trial at the time that Mr. Weiner substituted into the matter, and, therefore, whether and to what extent Mr. Weiner's services prior to trial were "necessary," evidences the total and complete conflict of interest between Mr. Weiner and Petitioner.

Weiner's actions demonstrate the reasons behind the California Court of Appeal's statement in *Wong v. Superior Court*, 246 Cal.App.2d 541, 54 Cal.Rptr. 782 (1966), to the effect that:

"Due process of law does not permit an attorney to step out of his fiduciary role temporarily and obtain a judgment for his own benefit against his client who is for the first time being unrepresented and disabled from presenting any defenses and offsets."

The fact of the instant matter is that Petitioner was without counsel (she had not yet employed independent counsel) at the time that the portion of the trial dealing with the attorney fee issue began.

The trial court, on several occasions, acknowledged Weiner's precarious position, being in a position where he would object to questions posed to prior counsel Sigel demonstrating that trial preparation was complete at the time that Weiner substituted into the case, while still purportedly representing Petitioner Diller. *E.g.*, RT 4180-4181, 4186-4187, 4199, 4206.

In fact, Weiner's conflict is readily apparent from his *extensive* cross-examination of Sigel *prior to the time that Petitioner Diller obtained separate counsel*. RT 4254-4329. Diller thus went unrepresented during the cross-examination of Sigel wherein Weiner's sole line of inquiry attempted to justify the time that he had spent with respect to the case.

Sigel was excused as a witness prior to Petitioner Diller's obtaining of separate counsel. RT 4343, 4347.

"THE COURT: The record will indicate that the petitioner, DOROTHY DILLER, has, at my suggestion, employed another lawyer to represent her in connection with the fee disputes and *that other lawyer is Mr. Saul. . . .*" RT 4347; emphasis added.⁶

Later, on December 4, 1987, the Court agreed to hear motions concerning attorney fees, and specifically stated that "it was appropriate that Mr. Saul be present." RT 4349.

The trial court, however, was obviously under an erroneous assumption with respect to its power to order fees, because it believed that *Wong v. Superior Court*, 246 Cal.App.2d 541, 54 Cal.Rptr. 782 (1966), had been overruled, stating:

"[W]hen I return I'm going to tell Mr. Diller that if he has a different idea about his position than that expressed to me by Mr. Robinson that he also should be represented on the fee issue, and I think that I say that because of the language – and I don't know if it's in *Jakeman [sic]*, *Berlin*, *Hopkins*, or *Wong* – but it's in one of those cases.

Wong is the oldest of the cases. *Wong v. Superior Court*. It's the most – it's the most restrictive, but I think that the language – the intent of 4370.5 was to reverse or to change the reliance on those cases and to give the court greater authority concerning the source of fees even if there was a dispute between the lawyer and the lawyer's client." RT 4372-4373; emphasis added.⁷

⁶ The court thus acknowledged Mr. Saul's representation of wife in connection "with the fee disputes" and did not limit Mr. Saul's participation merely to the interim fee dispute only. As we shall see, the court later precluded Mr. Saul's participation on the issue of fees leaving only the lawyers who had a conflict of interest with their client to be heard or to otherwise participate, resulting in a total failure of either party to have counsel with respect to the fees claimed by their own lawyers, Weiner for Ms. Diller, and Robinson for Mr. Diller.

⁷ Critically, it appears that the trial court was under the mistaken belief that the *due process* requirements set forth in *Wong* had been effectively overruled by Civil Code Section 4370.5. This simply does not

After both counsel [Robinson and Weiner] had each requested an interim attorney fee award and *after Mr. Weiner had stated that he did not oppose the request for fees made by Mr. Robinson* so long as there would be a later "full-blown hearing" with respect to the source of such fees (RT 4358-4359), Mr. Saul specifically objected to the fees then sought by wife's attorney. RT 4373

The court stated it wanted the details of the fees to be brought out and *that there should be cross-examination by Mr. Saul*, saying:

"[I] am the one that insisted that Mrs. Diller have a lawyer. . . . And I don't intend to have her come here with a lawyer and have it be an idle thing. . . . I have ordered declarations in this case, *subject to cross-examination by these lawyers [Robinson and*

(Continued from previous page)

appear to be Legislature's intention *when there exists a dispute as between the lawyer and the lawyer's client*. Besides the fact that Wong is not even mentioned in the 1985 Law Revision Commission Comment to Civil Code Section 4370.5, that Comment expresses a limited intent by the Legislature to overrule only certain language in, e.g., *Jafeman* and *Hopkins*, with respect to the source of the fees, not with respect to a petitioner's due process right to a full and adequate hearing on the fee issue, stating:

"Subdivision (c) broadens the court's ability to make an appropriate award of costs and attorney's fees by expressly authorizing the court to order payment from any source that appears proper, including the community and separate estates of the parties. *This overrules language in the cases holding, for example, that the court may not require a wife to impair the capital of her separate estate in order to defray her litigation expenses. See, e.g., In re Marriage of Jafeman*, 29 Cal.App.3d 244, 105 Cal.Rptr. 483 (1972); *In re Marriage of Hopkins*, 74 Cal.App.3d 591, 141 Cal.Rptr. 596 (1977)."

Wong has in fact most recently been cited with approval (with respect to its procedural limitations) subsequent to the 1985 Law Revisions Commission Comment in *In re Marriage of Tushinsky*, 203 Cal.App.3d 136, 249 Cal.Rptr. 611 (1988).

Weiner], plus you [Mr. Saul, independent counsel for wife] plus a lawyer – another lawyer, if Mr. Diller [husband] wants to hire him or her.” RT 4375, 4377-78.⁸

The matter was then continued to December 10, 1987 to allow Mr. Saul to file an opposition (RT 4377) and to allow Mr. Diller to retain independent counsel (RT 4378).

On December 7, 1987, after the court informed Mr. Diller of the request for attorney fees made by his counsel on December 4, 1987, Mr. Diller asked that the fee request be checked out by another attorney who was experienced in such matters. RT 4387, 4389-4390.

On December 7, 1987, attorney Ronald Anteau appeared as husband's separate counsel on the issue of attorney's fees. The court, apparently recognizing that the parties had not authorized their lawyers to seek interim attorney's fees stated:

“I am making this a disputed issue with separate representation for these people on this issue. Do you understand that?” RT 4450-4451, emphasis added.

On December 10, 1987 independent counsel for each of the parties filed a memorandum in opposition to the request for interim fees. CT 461-482. After the parties (through independent counsel Mr. Saul) presented a settlement agreement to the court which provided, *inter alia*, that each party would bear his or her attorney fees, both Mr. Weiner and Mr. Robinson, objected to the settlement agreement (RT 4595), and the court said:

“You have taken steps that are absolutely contrary to your representation by Mr. Weiner, and forget about the attorney fees. That is a separate matter.

⁸ Counsel for husband made such oral request for interim fees and costs in the absence of his client and counsel for wife did not oppose the same so long as there was later to be a full blown hearing on the issue. Counsel for wife's oral request for fees in the sum of \$862,724.00 plus \$51,837.00 in costs was not opposed by counsel for husband.

We are just talking about that you have settled the case or you have discussed settlement of the case without having your lawyer involved. *Now it seems to me that is inconsistent with you holding Mr. Weiner in this case any further.*" RT 4469; emphasis added.

On December 14, the court rescinded the purported settlement agreement at Mrs. Diller's request and thereafter proceeded to hear argument only on the issue of interim fees. Mr. Anteau, appearing as independent counsel for husband argued that the motion for fees was not properly made orally and that Mr. Diller wanted an opportunity to review the billings and statements and stated that he did not argue the reasonableness of the total fees sought by counsel for husband because the interim order was made without prejudice to a later determination of that issue. RT 4663, 4667-4668.⁹

Contrary to the Stipulation and Order, no discovery or cross-examination was allowed and the court ordered the community to pay \$483,239.00 to counsel for wife and \$515,000.00 to counsel for husband as interim fees and costs, each of these amounts representing one-half the amount claimed by each respective counsel. CT 967-981.¹⁰ In making such an order, the court stated:

"This Court determines [that] these sums are reasonably necessary to be paid to Selvin and Weiner at this time as interim attorneys fees and costs. This Court makes no determination at this time as to who ultimately will bear responsibility for such fees and costs, and this Court reserves jurisdiction to determine the reasonable value of attorneys fees and costs owing to Selvin and Weiner, as well as who shall pay the fees and costs accrued to date, as

⁹ Thus independent counsel for husband also contemplated that there would be a later adversarial hearing at which time the question of the amount of attorney's fees and the reasonableness and need therefore would be litigated.

¹⁰ The community was also ordered to pay the entire balance of costs to each counsel. CT 976, 977.

well as any other attorneys fees and costs payable, due and owing to Selvin and Weiner as part of the judgment in this matter."

On December 17, 1987, the court set January 4, 1988 as the date for filing final declarations for attorneys fees and costs. RT 4926.¹¹

In setting such deadline, the court specifically advised counsel for the parties to provide independent counsel (Mr. Saul and Mr. Anteau) with copies of such filings. In so doing, the court gave no indication that independent counsel (Mr. Saul and Mr. Anteau) would not be allowed to participate in the final determination of attorneys fees and costs. Indeed, in setting a hearing for attorneys fees, the court had specifically stated that one day of hearing would be delegated "*for examination of anybody by Weiner, Saul, Robinson and Anteau.*" RT 4926.^{12 13}

However, on January 8, 1988, the date set for this adversarial hearing on the final attorney fee awards, the court, without explanation, changed its mind and prohibited independent counsel from participation, stating:

"The objections of Mr. Saul and Mr. Anteau to the court's interim order for attorney's fees is rejected. *The court does not intend to permit Mr. Saul or Mr. Anteau to participate in this proceeding concerning attorney's fees.* . . . The only purpose of this hearing

¹¹ Up to this time, neither attorney for the parties had noticed, either orally or in writing, a motion for final fees, except for Selvin and Weiner's motion filed long before on April 13, 1987, requesting \$567,835.65 in fees and \$33,082.94 in costs, much of which had been paid by Petitioner by the time of the hearing on the interim and final fee motions.

¹² A supplemental declaration filed by counsel for wife was served on both independent counsel.

¹³ The court thus promised a hearing at which counsel seeking the attorney fees (who had a conflict of interest with their respective clients) and independent counsel challenging the reasonableness or necessity of the claimed fees would participate in an adversarial hearing.

is to hear evidence. . . . *The issue in this case at this moment is primarily, what are the Petitioner's attorney's fees and who should pay them?*" RT 4931-4932.

"Mr. Saul, I am not going to hear you. There is no way that you can – if you want to get up and leave, fine. . . . I see no reason for you or Mr. Anteau to stay; but this is a public hearing, and you are entitled to stay. . . . This is just an evidentiary proceeding on [the attorney fees issue]." RT 4933, 4934.

The "hearing" then proceeded with only counsel who had a conflict of interest participating in a perfunctory manner and neither with any incentive to truly question the reasonableness of the fees sought by the other.^{14 15}

Thus counsel for wife received an additional \$785,742.00 and counsel for husband received \$685,025.00 as final fees making a total of \$1,719,347.00 to counsel for the wife and the sum of \$1,238,257.00 to counsel for the husband.¹⁶

¹⁴ The court, having previously recognized the existence of conflicts of interest between the parties and their counsel and of the need for each to have independent counsel on this issue thus permitted only those lawyers who had a conflict of interest to participate in the hearing which resulted in the award of almost \$1,500,000.00 in fees between them. That the financial interests of the lawyers overcame their duties to their respective clients is evident from the "kid gloves" manner in which each lawyer proceeded to "examine" the other.

¹⁵ Counsel for the parties were even less aggressive in their oral argument during which neither attorney questioned the amount of fees sought by the other.

¹⁶ Petitioner does agree that her attorneys should be paid a reasonable sum, but that, as with all attorney-client fee disputes, such sum should be determined in a separate proceeding wherein all the due process guarantees are afforded all of the parties.

REASONS FOR GRANTING THE WRIT

The decision below results in the creation of a separate, lesser and effectively a total absence of due process protection for clients involved in a fee dispute with their attorneys, *with judgment being rendered for the attorney and against his own client without the client's participation in a hearing upon which the judgment is based*. Such a lesser protection has been categorized by at least one state court as "unique in, and . . . otherwise inimical to, the legal profession." *In re Marriage of Pitulla*, 141 Ill.App.3d 956, 961, 96 Ill.Dec. 276, 491 N.E.2d 90 (1986). Even among the many California decisions which conflict with the decision of the Court of Appeal below are statements to the effect that "[d]ue process of law does not permit an attorney to step out of his fiduciary role temporarily and obtain a judgment for his own benefit against his client who is for the time being unrepresented and disabled from presenting any defenses and offsets." *Wong v. Superior Court*, 246 Cal.App.2d 541 (1966).

While the questions presented here might now be unique to attorney-client fee disputes, as all other disputes have required a "meaningful opportunity" to participate prior to entry of a judgment, the questions are of national importance because of the importance of preserving the integrity of the attorney-client relationship and because a statutory scheme with respect to the attorney fee issue like that present in California is present in a vast number of states through the Uniform Marriage and Dissolution of Marriage Act.

By itself, this case involved an award of attorney fees in excess of three million dollars; a nationwide practice similar to the result reached by the decision below can only result in hundreds of millions of dollars in attorney fee awards being entered for the benefit of an attorney and against his own client without the client being afforded due process or any

effective scrutiny of his counsel. Serious nationwide criticism must result from such a practice.

The reasons for granting this writ can be summed up very simply: should attorneys, who have the benefit of vast knowledge, learning and experience with respect to the court system and who owe their clients the utmost in fiduciary duties, be awarded a judgment of attorneys fees against their client in the same litigation upon which they represent such client without the client's participation? Should this Court act to prevent such a nationwide appearance of injustice and impropriety? Are attorneys not duty bound to protect their clients, advise them in all respects, *and be fully accountable to them with respect to any issue, including their fee, to which they question?*

A "meaningful opportunity" to be heard is perhaps the most essential ingredient to a proper truth finding process. As Mr. Justice Frankfurter stated in his concurring opinion in *Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U.S. 123, 171-172 (1951):

"No better instrument has been devised for arriving at truth than to give a person in jeopardy of serious loss notice of the case against him and an opportunity to meet it. Nor has a better way been found for generating the feeling, so important to a popular government, that justice has been done."

It seems difficult, if not impossible, to conceive of a more serious deprivation of due process than that resulting from the decision below. The trial court promised petitioner that she would be able to participate through independent counsel in the hearing in which judgment for attorney's fees might result, but then precluded such participation. This appearance of impropriety and prejudice for the benefit of an attorney and against a client must be avoided.

I.

BY PRECLUDING A CLIENT'S PARTICIPATION IN A HEARING WHICH RESULTS IN JUDGMENT FOR FEES IN FAVOR OF AN ATTORNEY AND AGAINST HIS OWN CLIENT AFTER SUCH PARTICIPATION WAS PROMISED BY THE TRIAL COURT, THE DECISION BELOW CONFLICTS WITH DUE PROCESS PRINCIPLES ENUNCIATED BY THIS COURT.

On numerous occasions, this Court has stressed the importance of the most basic constitutional right to have a "meaningful opportunity" to be heard. This Court's powers of supervision should be exercised because of the lower court's departure from the accepted and usual course of judicial proceedings, i.e., proceedings where both sides have the opportunity to participate and fully and fairly present their respective sides.

The decision below conflicts with the principles set forth by this Court in the fountainhead case of *Powell v. State of Alabama*, 287 U.S. 45, 68-69 (1932), where, in discussing the importance of meaningful participation in a proceeding where judgment may be taken, this Court stated:

"[T]he rule that no one shall be personally bound until he has had his day in court was as old as the law, and it meant that he must be cited to appear *and afforded an opportunity to be heard*. 'Judgment without such citation and opportunity wants all the attributes of judicial determination; it is judicial usurpation and oppression, and never can be upheld where justice is justly administered.' Citations to the same effect might be indefinitely multiplied. . . . if in any case, civil or criminal, a state or federal court were arbitrarily to refuse to hear a party by counsel, employed by and appearing for him, it reasonably may not be doubted that such a refusal would be a denial of a hearing, and, therefore, of due process in the constitutional sense." Emphasis added.

Likewise, it may not be doubted that an award of judgment for an attorney and against his own client following an

arbitrary refusal to hear the client by the independent counsel, after promising participation by such independent counsel, results in a denial of due process.

The decision below violates this Court's continuous holdings to the effect that due process requires that there be "meaningful access" to the courts. *E.g.*, *Bounds v. Smith*, 430 U.S. 817, 823 (1977); *see, also*, *Mullane v. Central Hanover Bank and Trust Co.*, 339 U.S. 306, 315 (1950) [a "mere gesture" is not due process]. The trial court's actions below did not even rise to the level of a mere gesture of due process, as the affected petitioner was left totally gagged, without recourse or remedy.

The decision below precludes the meaningful participation *with cross-examination* in a hearing upon which a deprivation of life, liberty or property may occur which has many times been emphasized by this Court. *See, e.g.*, *Green v. McElroy*, 360 U.S. 474, 497 (1959) ["Professor Wigmore commenting on the importance of cross-examination, states in his treatise, 5 Wigmore on Evidence (3d Ed. 1940) Section 1367: 'For two centuries past, the policy of the Anglo-American system of Evidence has been to regard the necessity of testing by cross-examination as a vital feature of the law. The belief that no safeguard for testing the value of human statements is comparable to that furnished by cross-examination, and the conviction that no statement (unless by special exception) should be used as testimony until it has been probed and sublimated by that test, has found increasing strength in lengthening experience.' "]

Should attorneys, with their superior knowledge of the legal system, be protected from the rigors of cross-examination which Professor Wigmore has opined is so basic to the truth finding process?

Even in the administrative context, with its less rigorous procedural rules, this Court has required a meaningful opportunity for participation and cross-examination, especially where, as here, factual disputes may exist. *Goldberg v. Kelly*, 397 U.S. 254, 267 (1970) [" 'The fundamental requisite of due process of law is the opportunity to be heard.' [citation omitted] The hearing must be 'at a meaningful time and in a

meaningful manner.' [citation omitted] In the present context these principles require that a recipient have . . . *an effective opportunity to defend by confronting any adverse witnesses and by presenting his own arguments and evidence orally.*" Emphasis added.]; cf., *Kremer v. Chemical Construction Corporation*, 456 U.S. 461 (1982) [New York procedure not a denial of due process where it affords many procedural safeguards, including right to present testimony and right to rebut evidence.]

The effect of California's procedure as employed in the instant case is to wholly deprive the participation of a client in litigation wherein his own attorney can and will be awarded judgment against him; yet such a lack of due process has universally been condemned by this Court. *See, e.g., Coe v. Armour Fertilizer Works*, 237 U.S. 413, 422-423 (1915) ["[T]he 'due process of law' provision of the 14 Amendment . . . requires at least a hearing, or an opportunity to be heard, in order to warrant the taking of one's property to satisfy his alleged debt or obligation. . . ."]; *Boddie v. Connecticut*, 401 U.S. 371, 377 (1971) [Early in our jurisprudence, this Court voiced the doctrine that '[w]herever one is assailed in his person or his property, there he may defend. . . .']; *Fuentes v. Shevin*, 407 U.S. 67 (1972) ["The constitutional right to be heard is a basic aspect of the duty of government to follow a fair process of decisionmaking when it acts to deprive a person of his possessions. . . . For when a person has an opportunity to speak up in his own defense, and when the State must listen to what he has to say, substantively unfair and simply mistaken deprivations of property interests can be prevented."]; *Snaidach v. Family Finance Corporation of Bay View*, 395 U.S. 337 (1969); *see, also, House v. Mayo*, 324 U.S. 42, 46 (1945) ["[I]t appears that the trial court, without warning and over petitioner's protests, forced him to plead to the information without the aid and advice of his counsel, whose presence he requested. This was a denial of petitioner's constitutional right to a fair trial, with the aid and assistance of counsel whom he had retained. . . . It is enough that petitioner had his own attorney and was not afforded a reasonable opportunity to consult with him."]; *Hawk v. Olson*,

326 U.S. 271, 274 (1945) ["Denial of effective assistance of counsel does violate due process."]

By precluding the participation of a client in litigation concerning a fee dispute with his own attorney, the decision below conflicts with the important constitutional principles set forth in each of the decisions of this Court mentioned above. The sanctioning of such a procedure can only serve to chill attorney client relations throughout the nation, and can only lead to distrust of attorneys by their own clients.

II(a).

BESIDES A CONFLICT WITHIN THE CALIFORNIA COURT SYSTEM ITSELF, AT LEAST TWO STATE COURTS HAVE ISSUED DECISIONS WHICH CONFLICT DIRECTLY WITH THE DECISION BELOW SANCTIONING THE PRECLUSION OF A CLIENT'S PARTICIPATION IN A HEARING UPON WHICH AN AWARD OF ATTORNEY FEES WILL BE MADE IN FAVOR OF HIS OWN COUNSEL.

At least two states with similar statutory bases for awarding attorney fees have determined it improper to award fees to an attorney and against his own client within the same marital dissolution action for which such attorney represents the client. *Dickinson v. Dickinson*, 631 S.W.2d 61 (Mo.App. 1982) ["The provision for attorney's fees is amplified in the Commissioners' Note to Section 313 of the Uniform Act: 'The purpose of this section is to authorize the payment of costs and a *reasonable fee by one party to the other party's attorney* if the court . . . determines the order to be necessary.' (Emphasis added.) The trial court was authorized to award attorney's fees to one party and against the other, but there is no authority to fix the fee to be paid by one party to his own attorney, or to order fees paid out of undivided marital property."]; *Marriage of Marks*, 758 P.2d 257 (Kan.App. 1988) [Section 313 clearly does not authorize an award of fees from a client to his or her own attorney, and at least two courts have so held. . . . It did not add authority for the court to order one party to pay his or her own attorney. This interpretation is

bolstered by the Arizona Court of Appeals' statement about the Arizona version of Section 313. 'The statute is designed to ensure that the poorer party has the proper means to litigate the action.' *Countryman v. Countryman*, 135 Ariz. 110, 111, 659 P.2d 663 (App. 1983). This purpose is not furthered by requiring either party to pay his or her own attorney fees."]

Although Illinois currently sanctions a procedure similar to that utilized by the trial court below, its courts have themselves noted a great concern surrounding such a procedure. *See, In re Marriage of Pitulla*, 141 Ill.App.3d 956, 961, 96 Ill.Dec. 276, 491 N.E.2d 90, *supra* ["While section 508 permits judicial economy by eliminating the need for an attorney to sue his own client in a separate action to obtain a judgment for his attorney fee, *we must not lose sight of the fact that it also places an attorney and his client in adversary positions during the course of court proceedings. Moreover, the situation presents a circumstance where the client is not represented by counsel, although he or she is being opposed by counsel on a matter in which a judgment may be entered against the client. Plainly what is permitted by section 508 is unique in, and otherwise inimical to, the legal profession.*" emphasis added]; *In re Marriage of Pagano*, 181 Ill.App.3d 547, 130 Ill.Dec. 331; 537 N.E.2d 398 (1989).

And various published decisions of the California Court of Appeal itself conflict with the unpublished decision below by holding that due process does not permit an attorney to temporarily step out of his role and assume a conflicting role with his client in an effort to obtain a judgment for fees. *See, e.g., Wong v. Superior Court*, 246 Cal.App.2d 541, 54 Cal.Rpt. 782 (1966) ["[T]he divorce action was not the place to determine the amount which Norman Wong should be ordered to pay to his attorney. *Due process of law does not permit an attorney to step out of his fiduciary role temporarily and obtain a judgment for his own benefit against his client who is for the time being unrepresented and disabled from presenting any defenses and offsets.*"]¹⁷

¹⁷ C.E.B. *California Marital Dissolution Practice* (1983) Section 21.24, recognizes *Wong* as controlling authority which prevents a court

The reasons for preventing such trials and tribulations between counsel and client within a divorce proceeding are many, and include the sensitive fiduciary duty of counsel toward his client "which precludes the attorney from making personal gains" at the client's expense. *See, 7 Cal.Jur* (3d Ed. 1989), Attorneys at Law, Section 82.

The *Wong* reasoning has been most recently cited with approval in *In re Marriage of Tushinsky*, 203 Cal.App.3d 136, 249 Cal.Rptr. 611 (1988), stating:

"[T]he attorney's 'rights or interests are [not] injuriously affected by the judgment.' [citation omitted] The notice [of appeal] has no legal import with respect to adjudication of the attorney's claim for fees and costs from his client, who is a party to that action. It is established that such '[c]ompensation must be sought in an independent action by the attorney against the client, and not by application to the court in which the litigation is pending.' " *Id.* at 143.

In light of such language, the effect of the trial court's ordering of judgment for the attorneys here is as follows: If judgment were ordered for the client and against the attorney, the attorney could have instituted a separate action against his client and thereby be afforded "two bites at the apple." However, as it now stands, the judgment ordered for the attorney may, by collateral estoppel principles, preclude an

(Continued from previous page)

from ordering, as it did here, attorney fees to be paid from the community where the amount and necessity of such fees are disputed by the client, stating:

"It is important to distinguish between a disputed fee obligation between one party and his or her attorney on the one hand, and an undisputed fee obligation on the other. *Although the court can order an undisputed fee obligation to be paid out of the community property (Marriage of Jafeman, supra; Wong v. Superior Court, supra), it cannot order a disputed obligation to be so paid (Wong v. Superior Court, supra). See also Marriage of Berlin, supra (dissenting opinion).*"

action by the client with respect to the fee issue (although the client might well be able to maintain a separate action for offsets, negligence, etc.). Petitioner calls upon this Court for redress from this obviously unfair situation hereby created by the Court of Appeal, wherein only she could "lose" because of the trial court judgment below, whatever judgment may have been rendered.

The decision below also conflicts with state court decisions holding that a client has the right to appear with counsel of his choice at any stage of the proceedings. *E.g.*, *Kerling v. G.W. Van Dusen and Co.*, 109 Minn 481, 124 N.W. 235 (1910) ["A litigant has the right to be represented by counsel of his own choice, and unless for some reason the attorney is disqualified from accepting a retainer in a particular case, he has, while a duly qualified practitioner, the right to appear and act in court upon behalf of litigants at any stage of the proceedings."]; *Bardar v. Perrazzo*, 157 NYS 886 (1916); *see, also, Keister v. McDavid*, 76 A.2d 776 (Dist.Col. 1950); *Vallie v. Lutz*, 269 S.W. 947 (Mo. 1925); *Israel v. Zanesville and O. R. Co.*, 10 Ohio Dec Reprint 219, 19 WL Bull 258 (1888).

Undoubtedly, the effect of the trial court's preclusion of independent counsel from participating in the hearing with respect to attorneys fees resulted in the petitioner's being unrepresented and without a meaningful opportunity to participate. Such a lack of due process should be scrutinized by this Court.

II(b).

IN ORDER TO UPHOLD THE CONSTITUTIONAL DUE PROCESS VALIDITY OF THE PROCEDURE SET FORTH IN CALIFORNIA CIVIL CODE SECTION 4370 AND 4371, A LITIGANT'S RIGHT TO INDEPENDENT COUNSEL THEREIN SHOULD BE FOUND AND CONSTRUED BY THIS COURT. THE STATUTE IS SILENT THEREON AND THEREFORE THE BASIC RIGHT OF REPRESENTATION CAN READILY BE IMPLIED.

It is clear that a litigant should have the right of independent counsel even as against his original counsel when an

adverse situation develops. Other jurisdictions worry that a "same case" procedure can endanger this, as it did in this very case. The California statute permitting same case fee setting as to a client's *own* lawyer and not just his opponent's lawyer is nevertheless *silent* on the question of independent counsel. To resolve the apprehensions of other courts and to ensure due process, this Court by granting certiorari can readily both harmonize the diversity problem and uphold the California statute (and similar statutes) by construing it to permit independent counsel when a litigant chooses. After all, the statute is silent but the need is great.

It is a settled principle of statutory construction that:

"If a statute is susceptible of two constructions, one of which will render it constitutional in whole or in part or raise grave and doubtful constitutional questions the court will adopt that construction of the statute which, without doing violence to its language will render it valid [citing many]."

16 CJS Section 96b, Page 307

If the ruling below is left standing, it would be a precedent that the California statute would then *prohibit* independent representation and defeat due process. Whereas, by granting certiorari the statute could be saved from invalidity by this court's construction.

III.

THE APPEARANCE OF IMPROPRIETY RESULTING FROM THE PROCEDURE BELOW AND THE NATION-WIDE INTEREST IN ATTORNEY-CLIENT FEE DISPUTES, AMONG OTHER ITEMS OF IMPORTANCE SET FORTH HEREIN, MAKE THE QUESTIONS PRESENTED OF SUBSTANTIAL IMPORTANCE.

We are here confronted with what is a complete and utter deprivation of the right to participate in a hearing where judgment might be rendered. As demonstrated above, such a procedure conflicts with both a long line of principles and decisions, both of this Court and of various courts throughout

the Union. A sanctioning of the lack of procedural protections herein, for the benefit of an attorney and against his own client, can only result in a loss of public confidence in the legal system. But "care should be taken in every part of the system, not only to do right, *but to satisfy the community that right is done.*" 5 The Writings and Speeches of Daniel Webster, 163; [emphasis added]. Preserving the integrity of the attorney-client relationship in the court system is certainly a substantial concern of nationwide interest.

The fact that a similar statutory scheme as that present in California is present in a variety of jurisdictions by virtue of the Uniform Marriage and Dissolution of Marriage Act also demonstrates the substantial and nationwide importance of the issues presented herein. Like California Civil Code Section 4371, the Uniform Act provides for payment directly to an attorney of fees paid "by one party to the other party's attorney" (See, 9 Uniform Marriage and Divorce Act, Section 313) and not by the party being represented by such counsel, its purpose being "to ensure that the poorer party has the proper means to litigate the action." *Countryman v. Countryman*, 135 Ariz. 110, 111, 659 P.2d 663, *supra*. Yet, as demonstrated above, there exists a major conflict amongst state courts interpreting this nationwide scheme. Certainly resolution of the proper literal interpretation of such a seemingly simple statute is of substantial national interest in light of the vast amount of litigation which will be affected by the legislation.

Once again, by itself, this case involved an award of attorney fees in excess of three million dollars; a nationwide practice similar to the result reached by the decision below can only result in hundreds of millions of dollars in attorney fee awards being entered for the benefit of an attorney and against his own client without the client being afforded due process or any *effective* scrutiny of his counsel. Again, serious nationwide criticism must result from such a practice.

Attorneys, who have the benefit of vast knowledge, learning and experience with respect to the court system and who owe their clients the utmost in fiduciary duties, should

not be awarded a judgment of attorneys fees against their client in the same litigation upon which they represent such client simply upon their say as to how much time and effort they have expended, without their client's participation. Such a nationwide appearance of injustice and impropriety must not be sanctioned. Attorneys are duty bound to protect their clients, advise them in all respects, *and be fully accountable to them with respect to any issue, including the fees that they charge*. One cannot seriously argue that the preclusion of a client's questioning of his counsel with respect to fees in a hearing where judgment will be awarded against the client for such fees provides the client with the process due him.

The practice sanctioned by the court below is extremely similar to that long ago proscribed during the time of James II. As stated by the historian Macaulay in describing the bill of attainder enacted by the Irish Parliament:

"No investigation was made. Any member who wished to rid himself of a creditor, a rival, a private enemy, gave the name to the clerk at the table, and it was generally inserted without discussion." 3 Macaulay, *History of England from the Accession of James the Second* (London, 1855)¹⁸

Like the Irish Parliament's bill of attainder, the procedure of the court below provides for the member of the bar's statement regarding his fees to be given to the court and accepted without discussion. An erosion of the due process requirement of a meaningful opportunity to be heard in the context of attorney client fee disputes can only be the beginning of such an erosion of the due process principles so long held invaluable by this Court. Only this Court, as the final arbiter, can prevent this horrid bill of attainder for the benefit of counsel and against his own client.

¹⁸ See, concurring opinion of Justice Black in *Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U.S. at 146-147, *supra*.

CONCLUSION

For the foregoing reasons this petition for writ of certiorari should be granted.

Respectfully submitted,

THEODORE A. COHEN
12100 Wilshire Blvd.
Suite 1600
Los Angeles, CA 90025
(213) 447-6110

*Attorney for Petitioner
Dorothy Diller*

APPENDIX A

NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE
STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION SEVEN

In re the Marriage of Diller	)	No. B035205
DOROTHY DILLER,	)	(Super. Ct.
	)	No. D118626)
Appellant,)	
and	)	(Filed
	)	May 3, 1991)
STANLEY Z. DILLER,)	
)	
Appellant,)	
_____)	
SELVIN & WEINER, a)	
Professional Corporation,)	
)	
Respondent,)	
and)	
)	
ROBINSON, ROBINSON &)	
PHILLIPS, INC.,)	
)	
Respondent.)	
_____)	

APPEAL from an order for attorneys fees and costs as part of a Further Judgment on Reserved Issues of the Superior Court of Los Angeles County. Judge Robert F. Fainer, Judge. Affirmed.

APPEAL by appellant/petitioner, Dorothy Diller from Further Judgment on Reserved Issues entered April

App. 2

11, 1988 awarding her trial attorneys Selvin and Weiner attorneys fees and costs payable from the community property of the parties.

APPEAL by appellant/respondent, Stanley Diller from Further Judgment on Reserved Issues entered April 11, 1988 awarding his trial attorneys, Robinson, Robinson and Phillips attorney fees and costs payable from the community property of the parties.

Goldfarb, Sturman, Averbach & Sturman and Martin B. Snyder, attorneys for appellant Dorothy Diller.

Edward J. Horowitz, A Professional Corporation, attorney for appellant Stanley Diller.

Selvin, Weiner & Ruben, and W. Ruel Walker, A Partnership Including Professional Corporations, attorneys for respondent Selvin & Weiner.

Carlsmith, Ball, Wichman, Murray, Case, Mukai & Ichiki, and Clark Heggeness, Joseph D. Mullender, Jr. attorneys for respondent Robinson, Robinson & Phillips.

INTRODUCTION

The parties were married on December 18, 1955 and separated on May 1, 1984, petitioner Dorothy Diller filed a petition for dissolution of marriage on June 7, 1985. The parties had accumulated assets valued in excess of \$40,000,000, which after allowances for liabilities left the parties with net community assets valued between ten and fifteen million dollars. A Judgment of Dissolution of the marriage was filed on November 26, 1985 as to the

App. 3

status of the marriage only, all other issues were reserved for further hearing. The trial on the reserved issues was assigned to Judge Robert Fainer on May 19, 1986 and was trailed until August 10, 1987 when actual testimony commenced. The trial, with interruptions encompassed forty-nine days of testimony through December 17, 1987.

On December 4, 1987 motions were made by counsel for petitioner and respondent for an order for payment of interim attorney fees and costs. Each attorney had received some fees and costs from their clients or by court order prior to this date, however, due to the nature of the litigation substantial fees and costs had accrued and been incurred which the respective attorneys had not been paid.

On December 14, 1987 Judge Fainer made an order for payment of interim fees and costs as follows: "The court orders interim fees to Mr. Weiner (attorney for petitioner) in the amount of \$431,362.00 plus \$51,877.00 costs paid out of the community funds and to Mr. Robinson (attorney for respondent). The amount of \$425,000.00 interim fees plus \$90,000.00 costs paid out of community funds. Additional fees will be decided when the case is over."

At the conclusion of the trial and after oral and written argument the court took the case under submission on January 15, 1988 and issued a Statement of Decision and Further Judgment on Reserved Issues on April 15, 1988. The court found the reasonable value of the services rendered and costs advanced by petitioner's counsel to be the sum of \$1,719,347.73 through January 31, 1988 plus \$49,444.00 for services and costs advanced

App. 4

after January 31, 1988 to the date of the entry of Further Judgment on Reserved Issues.

The court found the reasonable value of the services rendered and costs advanced by respondent's counsel to be the sum of \$1,216,607.23 through February 22, 1988 plus \$21,650.00 for services performed after February 22, 1988 to the date of the entry of Further Judgment. The court gave each party credit for fees and costs previously received by their counsel and deducted the amounts ordered pursuant to the interim order of December 14, 1987 and ordered that the balance due to each attorney after all credits be paid directly to the attorneys from the liquid community property of petitioner and respondent. The amount payable to Selvin and Weiner being \$785,742.00 and to Robinson, Robinson and Phillips \$680,525.00.

Both parties appealed the Judgment on Reserved Issues of April 11, 1988 insofar as the judgment awarded attorney fees to their respective counsel.

ISSUES

1. Did the court have jurisdiction to make its interim order for attorney fees and costs on December 14, 1987?
2. Did the court have jurisdiction to make a final order for attorney fees and costs in its Further Judgment on Reserved Issues entered April 11, 1988?
3. Were the attorney fees and costs necessary to the litigation and reasonable in the amounts found by the court?

App. 5

4. Were the parties afforded sufficient due process of law to present evidence to challenge the reasonableness and necessity of the attorney fee and costs made in the Judgment on Reserved Issues of April 11, 1988.

FACTS

The long journey from the filing of the petition for dissolution to the entry of Judgment on Reserved Issues took 3 years and 10 months, during this period of time the parties engaged in a continuous legal battle in which neither party would concede any issue, even those of a minor nature, and demanded that their attorneys litigate each issue to the fullest. The original Order to Show Cause required thirteen days of testimony, the actual trial lasted forty-nine days. The court reporter's transcript consisted of twenty volumes for a total of 5165 pages. There were a total of 110 separate court appearances, dozens of hearings of motions filed by the parties 85 depositions and thousands of pages of exhibits. There were nineteen days of reference proceedings and it was necessary for the trial judge to write an 87 page Statement of Decision. The Judgment on Reserved Issues constituted 57 pages.

During the course of the litigation the court on several occasions called to the attention of the parties that due to their inability to resolve their differences and their insistence on litigating each minor issue that the attorney fees were escalating and would be in excess of \$1,000,000. No amount of advice from the judge deterred the parties from their obsession to grind on with the litigation, without concern as to its costs or consumption of time.

App. 6

Near the conclusion of the trial when evidence was being presented regarding attorney fees and costs, with the concurrence of the trial judge each party consulted additional counsel to advise them with regard to the issues of assessment and allocation of attorney fees and costs.

DISCUSSION

The court had jurisdiction to make its interim and final order for payment of attorney fees and costs from the community property.

In order to exercise some control over litigation which was becoming increasingly time consuming and expensive and unlikely to result in a settlement, the court met with the attorneys to set guidelines and limits regarding trial of the case. These discussions resulted in the signing and filing on October 19, 1987 of a document entitled "Consent, Waiver and Stipulation re Abbreviated Trial, etc. and Order". This document was signed by petitioner, respondent and their respective counsel. Based upon the stipulations the court signed the following order:

"The court is satisfied that the respective parties are aware of and understand the provisions, the advantages and disadvantages of their Consent, Waiver and Stipulation, and have entered into and consented to this Agreement freely, without coercion, duress or undue influence, with full advice of independent counsel other than their respective counsel of record, with awareness and knowledge of their rights to

App. 7

a full trial and knowledge and understanding of this abbreviated trial procedure.

"The waiver, consent and stipulation is accepted by the court and it is hereby *ORDERED* that the trial continue forthwith in conformity with this abbreviated trial procedure described in the Consent, Waiver and Stipulation."

Prior to entering into the stipulation setting forth the procedure to shorten the trial each party discussed the proposed stipulation with counsel other than their trial counsel and had ample opportunity to clarify, change or reject the agreement. The signed document states as follows:

"Both petitioner and respondent have consulted with counsel independent of their respective trial attorneys as to the wisdom and ramifications of entering into this stipulation, and based upon such consultation, each hereby agrees that he and she have read and understood this stipulation and the benefits and risks of the procedure contemplated and outlined herein, and that each further waives his or her respective rights to object to the abbreviated trial procedure as set forth herein."

Paragraph 25 established the procedure for determination of attorney fees, each counsel was to file documentation with the court setting forth their respective claims for attorney fees subject to cross-examination by the other counsel.

Paragraph 25 "The court will receive testimony and other evidence concerning attorneys' fees and litigations costs, the reasonable value

thereof, the necessity thereof, the evaluation thereof, and the assessment, if any, to either party, their respective attorneys and/or to the community. The court will permit each side one and one-half (1-1/2) days on this issue after depositions have been taken of Weiner and Robinson (not to exceed three (3) hours each) and appropriate documentation has been filed setting forth the direct testimony of each attorney in connection with such claims for attorneys' fees and costs. The bulk of the court testimony is contemplated as cross examination of a particular declarant."

Notwithstanding any other legal basis the judge had for setting and assessing attorneys fees, the parties specifically conferred upon the court by their stipulations the jurisdiction to determine the necessity of the legal services and the reasonable value thereof, against whom the fees would be assessed or if the fees would be assessed against the community property.

The conduct of the parties throughout the litigation necessitated the court to control the proceedings so that the matter could be concluded within a reasonable period of time. If a trial could go on forever, this trial would have been a candidate for that dire distinction had not the trial judge guided and limited the proceedings. On various occasions during the time that Judge Fainer presided over this matter he discussed with the parties, advised and warned them of the escalating attorney fees being incurred. The parties throughout the proceedings were hostile and bitter towards each other and demanded that their attorneys litigate minor issues resulting in unwise expenditure of the attorneys and court's time.

The experienced trial judge in this case who had the opportunity to observe the parties over a period of forty-nine days of trial and numerous motions and conferences set forth in his Statement of Decision his impression of the parties which help explain the large legal fees and costs of which the petitioner and respondent now complain.

Page 5. "The trial and attitude of the parties created great difficulties for the lawyers both in trying the action and in preparing for trial."

"There has been an unreasonable expenditure of court time and lawyer time on both sides, as well as court appointed referee time, during the trial preparation, particularly in the period after the action was assigned to Dept. 10 for trial on 5/19/86 because of the evasive, contentious attitude of the parties."

"The personalities of the petitioner, the respondent and the claimants as well as their attitude towards each other and the litigation process . . . explain and justify the substantial time spent by the lawyers."

Page 6. "The petitioner . . . was obsessed with her beliefs and claims . . . that respondent was concealing community property assets. She asserted unprovable claims of misconduct by respondent and pursued property issues that had minimal value. . . ."

"The petitioner throughout the trial was a frightened bitter woman."

"The respondent is an avaricious, covetous, stubborn man. During the course of the trial Mr. Diller was evasive, unco-operative, distrustful,

discourteous, unyielding and self righteous and was a manipulative litigant."

Page 7. "The parties exerted unreasonable and excess pressure on their lawyers."

"The respondent had almost daily disputes with his lawyers, indicating Mr. Diller's paranoia about the trial evidence and the significance of some of the trial evidence."

"While many of the petitioner's claims were unprovable and unrealistic, it was respondent, in his attempts to control, to dominate, and even to obstruct the trial preparation and the trial proceedings that caused the most notable and unreasonable delays and consumption of trial and lawyer time."

Page 8. "The time spent in document production and in discovery was exacerbated by the evasiveness, the hostility and the uncontrolled contentiousness of Mr. Diller."

"The contributions of each to the length of the trial are so intertwined to be susceptible of division.

"The venality and the unrelenting, bitter belligerency of the parties made trial preparation and trial presentation difficult, oppressive and frustrating for the parties themselves, for their lawyers and for the court."

Page 10. "The hard realities of this unhappy case are that it was impossible to ever be ready for trial because neither party was ever going to accept any decision or solution to the distribution of property but their very own."

"The court notes that both Mr. Weiner and Mr. Robinson throughout the trial attempted to

narrow the issues and reduce the trial in the face of objections by their respective clients."

In addition to the parties stipulating to the jurisdiction of the court to set attorney fees, both parties in their respective Petitions for Dissolution specifically requested the court to set, assess and allocate attorney fees. Additionally sections 4370 and 4370.5 of the California Civil Code provides the legislative basis for attorney fees in family law matters.¹

¹ "§ 4370. Costs and attorneys fees pendente lite; attorneys fees for enforcement of support order

"(a) During the pendency of any proceeding under this part, the court may order any party, except a governmental entity, to pay such amount as may be reasonably necessary for the cost of maintaining or defending the proceeding and for attorneys' fees; and from time to time and before entry of judgment, the court may augment or modify the original award for costs and attorneys' fees as may be reasonably necessary for the prosecution or defense of the proceeding or any proceeding related thereto, including after any appeal has been concluded. . . .

"(b) During the pendency of any proceeding under this part, an application for a temporary order making, augmenting, or modifying an award of attorneys' fees or costs or both shall be made by motion on notice or by an order to show cause, except that it may be made without notice by an oral motion in open court *in either of the following cases:*

"(1) At the time of the hearing of the cause on the merits . . .

"§ 4370.5. Justness an reasonableness of award by court; considerations; order of payment

(Continued on following page)

The court after hearing all of the evidence found that both counsel had rendered their professional services with the same expertise, care and skill ordinarily and usually used in family law actions in the Central District of the Superior Court of Los Angeles County. There is nothing in the record to indicate otherwise. The court further found that the fees and costs reimbursements were reasonable, proper and necessary.

On December 4, 1987 during the trial on reserved issues, counsel for respondent, Robinson, Robinson and Phillips made an oral motion for interim attorney fees and costs. This motion was not opposed by petitioner's counsel Selvin and Weiner, who made their own motion for interim fees and costs. Both parties in their appeal

(Continued from previous page)

"(a) The court may make an award under this chapter where the making of the award, and the amount of the award, is just and reasonable under the circumstances of the respective parties.

"(b) In determining what is just and reasonable under the circumstances, the court shall take into consideration both of the following:

"(1) The need for the award to enable each party, to the extent practical, to have sufficient financial resources to adequately present his or her case, taking into consideration to the extent relevant the circumstances of the respective parties described in subdivision (a) of Section 4801.

". . . .

"(c) The court may order payment of the award from any type of property, whether community or separate, principal or income."

urge that the court lacked jurisdiction to order interim fees and costs, however, a review of the court file indicates that petitioner in sixteen separate documents filed with the court requested interim fees and filed four specific Orders to Show Cause requesting interim fees, final fees and costs on June 7, 1984, February 25, 1985, December 16, 1985 and April 13, 1987, in the April 13, 1987 Order to Show Cause she requested \$567,835.65 attorney fees and \$33,082.94 in costs. Respondent, husband filed multiple documents with the court in response to the Order to Show Causes by petitioner in which he requested interim fees, final fees and costs against petitioner.

In arriving at its determination setting attorney fees the court had before it numerous and lengthy declarations and financial documents filed in a period of four years. There was ample evidence before the court upon which it could base an attorney fee order. On December 10, 1987 petitioner's counsel filed a declaration and exhibits regarding attorney fees constituting 439 pages which was supplemented on January 4, 1988 with an additional 304 pages. Respondent's counsel filed a declaration and exhibits documenting his attorney fees which constituted 123 pages. In the four years prior to December 1987 the parties filed declarations and exhibits directed towards attorney fees which involved several hundred pages.

The parties having acted unwisely during the entire course of the litigation had incurred substantial fees and costs due to their respective attorneys which were mostly unpaid in December 1987. The attorneys had carried the cost of the litigation and were financially hurting and not

receiving funds from their clients in that court ordered restraining orders tied up the community assets and neither party had separate funds to pay attorney fees. Realizing the court was about to order the payment of the majority of the attorney fees incurred to date, after three days of hearings on attorney fees and costs December 2, December 3 and December 4, 1987 the parties without their counsel signed a stipulation on December 6, 1987 in which the husband and wife agreed to pay their own attorney fees and resolving other issues thus withdrawing the issue of attorney fees from the court.

The stipulation was presented to the court on December 10, 1987 after another two days of testimony regarding attorney fees. This stipulation, if valid, would have required counsel to bring an independent action against their clients in separate lawsuits for attorney fees which would have delayed payment of attorney fees for several years.

On December 10, 1987 the court advised the wife that he considered the stipulation unfair to her and suggested she consult an independent counsel whom she had previously consulted regarding the August 1987 stipulation and attorney fees. On December 11, 1987 the petitioner renounced her signature to the stipulation and the stipulation was withdrawn. The court on December 14, 1987 ordered payment of interim attorney fees and costs.

In the case of *In re Marriage of Hatch* (1985) 169 Cal.App.3d 1213, 1218, 1221, the wife applied to the court for an interim attorney fee order which the trial court denied stating the court did not grant interim fee orders. The wife in order to prepare her case required an actuary

and an appraiser, and did not have funds to pay her attorney. The appeals court ordered interim attorney fees to the wife stating:

"The public policy of California strongly favors settlement as the primary means of resolving legal disputes. . . . This result can most easily and most rapidly be reached where each spouse has reasonable and able counsel representing them with some assurance they will be fairly compensated for their services consistent with the financial circumstances of the parties."

The court further stated:

"Unfortunately it is often true that the financial circumstances of spouses at the breakup of marriages do not permit timely payment of counsel for services as they are rendered and, in fact, counsel for financially disadvantaged spouses rarely receive final payment until long after the litigation is over. However, the courts should not make a bad situation worse. The suggestion of the trial court that attorneys handling marital dissolution cases must be prepared to 'carry the client until the time of trial' is not only demeaning to attorneys handling family law cases, it fails to consider the present day realities of the economics of the practice of law. . . . Given the complexity of modern day family law litigation and the significance of this litigation to our society, courts should be doing everything they can to encourage, not discourage, able attorneys to handle family law cases."

" . . . The approach suggested by the trial court would . . . compel the attorney to finance the litigation by deferring receipt of payment for

services until months or years after they are performed, while the attorney would have to personally advance the costs of overhead attributable to the case. Even worse, it would require attorneys to advance from their own pockets sizable expenditures required as a matter of course in such litigation, such as expense for depositions and experts. Banks and finance companies are licensed for the purpose of lending money; lawyers are not."

Judge Fainer properly ordered payment of interim attorney fees from the liquid community assets.

Consistent with their prior attempt to delay payment of attorney fees after entry of the Further Judgment on Reserved Issues, the parties again without counsel signed a new stipulation stating regardless of Further Judgment by the court;

1. Each party would bear their own attorney fees and costs.
2. Withdrawing respective pending motions for a new trial, and
3. Modifying the Further Judgment to delete any reference to attorney fees or costs. Subsequent to this stipulation both parties have filed malpractice actions against their respective counsel.

The parties were afforded due process of law to present evidence to challenge the reasonableness and necessity of the attorney fees and costs ordered by the court in the Judgment on Reserved Issues of April 11, 1988.

Petitioner and respondent both contend that the portions of the judgment they appeal from should be reversed because the trial court allegedly denied due process of law by determining the amounts of fees and costs which it awarded based upon their attorneys' written declarations and supporting documentation and without permitting them to have their independent counsel cross-examine their attorneys to adopt this argument would establish a rule that in every dissolution action where attorney fees and costs are in issue there would be a trial within the trial requiring additional counsel to cross-examine the trial counsel regarding his or her attorney fees and that an attorney would always have a conflict with his client when the court is asked to set and allocate attorney fees.

The parties by their stipulation of October 19, 1987 conferred upon the court the jurisdiction to determine the necessity and reasonableness of the attorney fees and to allocate payment to either party or to the community. Additionally the parties agreed that "the court will have full discretion to limit direct and cross-examination and the introduction of other evidence. . . ." This agreement was signed by both parties and their counsel. Additionally each party consulted their counsel prior to signing the stipulation.

In a similar factual situation *In re the Marriage of Berlin* (1976) 54 Cal.App.3d 547, the parties were engaged in a bitter dispute over the division of a large amount of community property. The parties arrived at a stipulation settling all issues but attorney fees and costs and stipulating to submit the issue of attorneys fees and costs to the court, and that the attorney fees would be paid out of the

community property. The court awarded \$10,000.00 fees to each attorney and both parties appealed. The appeals court affirmed stating, "The trial court had jurisdiction to award attorney fees to both counsel to be paid out of the community property if the parties so agreed."

The court had substantial evidence before it to determine the necessity, reasonableness and amount of the attorney fees and costs. As previously discussed the court file contained declaration and exhibits relating to the financial affairs of the parties, financial declaration and business records. These records if bound would contain enough pages to constitute several novels, although none would make the best seller list.

Many days of testimony were taken on financial matters, several days relating to attorney fees and costs only. Both trial counsel took the stand and were cross-examined by the other counsel as to attorney fees and costs. Office records were produced. On January 8, 1988 Judge Fainer decided he did not need any additional evidence to determine the reasonableness and necessity of attorney fees and costs and their allocation. On January 8, 1988 the entire day was spent presenting the testimony of petitioner, respondent, attorneys and witnesses regarding the allocation of attorney fees. Thereafter, counsel submitted written arguments to the court.

Throughout the trial each party argued that the other party should pay all of the attorney fees for both parties. The allocation of payment was argued more often and strenuously than the amounts. The court found both parties were at fault in causing the trial to far exceed the time it should take to try such a case and thus ordered all

of the attorney fees and costs to be paid from the community property.

Each attorney had submitted to the court extensive bills and invoices showing the number of hours spent on the case and describing the work performed and the hourly rate.

A trial judge in a family law matter observes the parties and counsel throughout the trial and evaluates the evidences and is in the unique position to see the whole picture and all its individual parts as it is being painted. A separate proceeding introducing additional counsel on the issue of attorney fees would require additional time, result in compounding the attorney fees and further burden an already strained court system. During the trial the court is able to ascertain the time spent by counsel and the necessity of the work and the reasonable value of the attorney's services.

In *Jones v. Jones* (1955) 135 Cal.App. 52, 64, the court in affirming a trial court's awarding of attorney fees stated that direct evidence of the reasonable value of attorney fees need not be introduced.

"Evidence as to such reasonable value of services is necessarily before the trial court when it hears a case. The trial judge, being a lawyer, can readily ascertain from the presentation of the case the approximate time spent in preparation and trial, and the relative financial circumstances of the parties. The trial court has a wide discretion in fixing the fee, which can be upset only for an abuse of discretion."

Petitioner argued strenuously that respondent should pay all the attorney fees and costs and respondent argued

that petitioner should pay all the attorney fees and costs contending her unreasonable demands caused the lengthy trial and large attorney fees and costs.

Both parties were successful in that petitioner was not required to pay respondent's fees, nor he pay hers. All of the attorney fees and costs were ordered paid out of the community property. The court exercised its discretion from its review of all of the evidence.

"The question of the reasonableness of an order for attorney fees is addressed to the sound discretion of the trial court, and in the absence of a clear showing of abuse, not presumed but affirmatively established, its determination will not be disturbed on appeal." (*In re Marriage of Gonzales* (1976) 57 Cal.App.3d 736, 749.)

The court further stated:

" 'A reviewing court is not authorized to revise the lower court's judgment even if it should be of the opinion that it would have made a different award had the matter been submitted to its judgment in the first instance, in the absence of a clear abuse of discretion.' 'The discretion was the trial judge's, not ours; and we can only interfere if we find that under all the evidence, viewed most favorably in support of the trial court's action, no judge could reasonably have made the order that he did.' . . . It is settled that a judge may rely upon his own experience and knowledge of the law practice, as well as on the facts and circumstances of the case as they appear from pleadings and other papers.' "

The court had jurisdiction to make both the interim order and judgment for attorney fees and costs. Although

the attorney fees and costs are extremely high and this writer is concerned that they taint the quality of the system, the parties by their actions and conduct caused this aberration and under the circumstances the services performed by the attorneys was necessary and the fees and costs reasonable. The parties were afforded due process in the setting of the fees by the court.

DISPOSITION

The interim order for attorney fees and the Further Judgment on Reserved Issues is affirmed.

NOT TO BE PUBLISHED.

KALIN, J.*

We concur:

LILLIE, P.J.

WOODS (Fred), J.

* Assigned by the Chairperson of the Judicial Council.

App. 22

APPENDIX B

Second Appellate District, Division Seven,
No. B035205
S021450

IN THE SUPREME COURT OF THE
STATE OF CALIFORNIA

IN BANK

(Filed Jul. 17, 1991)

DOROTHY DILLER, Appellant

v.

STANLEY Z. DILLER, Appellant

Petitions for review DENIED.

LUCAS
Chief Justice

APPENDIX C

SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF LOS ANGELES

In Re the Marriage of	)	Case No.
DOROTHY DILLER,	)	D 118 626
)	
Petitioner,	)	Trial Date:
	)	August 3, 1987
and	)	Time: 9:00 a.m.
STANLEY Z. DILLER,	)	Department: 19
)	
Respondent.	)	FURTHER
_____	)	JUDGMENT ON
	)	RESERVED
And Related Claims.	)	ISSUES
	)	(Filed
_____	)	Apr. 11, 1988)

The issues in this case were bifurcated and Judgment of Dissolution of Marriage on the bifurcated issue of the status of the marriage was entered on November 26, 1985. The foregoing Judgment reserved for further determination all issues other than the status of the marriage.

On May 19, 1986, the reserved issues were assigned for trial to Department 19 of the above-entitled Court, Judge Robert Fainer presiding. The trial on reserved issues was continued and/or trailed in Department 19 until August 10, 1987, when trial testimony commenced. Petitioner Dorothy Diller and third-party claimant Arthur Diller (an adult son of the parties) appeared in person and were represented by Beryl Weiner of Selvin and Weiner. Respondent Stanley Diller and third-party claimants Michael and Sheryl Rosenberg (an adult daughter of the parties) appeared in person and were represented by

Mark P. Robinson of Robinson, Robinson & Phillips, Inc. Third-party claimant Joseph Gold appeared in person and was represented by Alexandra Ganley. On or about August 10, 1987, respondent dismissed his claims against Joseph Gold; and, during the course of the trial, petitioner dismissed her claims against Michael and Sheryl Rosenberg, and respondent dismissed his claims against Arthur Diller. All references herein to "the parties" mean petitioner and respondent.

The trial took place over 49 days; and the last date of trial testimony, except with regard to the issue of attorneys' fees and the presentation of oral argument, was December 17, 1987. Subsequently, the parties presented oral and written arguments to the Court, and the matter was submitted for decision and entry of this Further Judgment on Reserved Issues (hereinafter sometimes simply "Further Judgment") on January 15, 1988.

During the trial herein, the parties entered into certain stipulations; and, during the trial, documentary and oral evidence were introduced on behalf of the parties. The Court rendered its Memorandum of Tentative Decision on March 9, 1988, and its Statement of Decision on April 11, 1988, and, now, therefor:

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED AS FOLLOWS:

1. COMMUNITY PROPERTY AWARDED TO PETITIONER

The following-described community assets shall be and hereby are awarded to petitioner as her sole and separate property:

a. That certain real property commonly known as 303 South Doheny Drive, Los Angeles, California, and more particularly described as:

"Lot 8 in Block 4 of Tract 5647, in the City of Los Angeles, County of Los Angeles, as per map recorded in Book 60, page 88 of Maps, in the office of the County Recorder of the County of Los Angeles, except therefrom the southerly 14 feet front and rear of said lot."

b. That certain real property commonly known as 155-157 South Detroit Avenue, Los Angeles, California, and more particularly described as:

"Lot 209 of Tract 5207, in the City of Los Angeles, County of Los Angeles, as per map recorded in Book 109, Pages 55 and 56 of Maps, in the office of the Recorder of said County."

c. All bank accounts in the name of Diller Doheny Management, including the account maintained at National Bank of California, 117 North La Cienega Boulevard, Los Angeles, California 90048, account No. 166-001-0594.

d. One hundred percent (100%) of the issued and outstanding stock of Diller Floor Covering, Inc., a California corporation, and all right, title, and interest in and to said corporation and all of its assets, and all sums due or receivable from said corporation.

(1) Ownership of said stock in Diller Floor Covering, Inc., includes a fifty-percent (50%) interest as a general partner in Holiday Villa, a 100-bed retirement home

located at 1450 17th Street, Santa Monica, California, the legal description of which is:

"Lots J, K, and L in Block 158, in the Town of Santa Monica, in the City of Santa Monica, in the County of Los Angeles, as per Map recorded in Book 3, Pages 80 and 81, and in Book 39, Page 45, *et seq.*, of Miscellaneous Records in the Office of the County Recorder of said County."

(2) Additionally, ownership of said stock in Diller Floor Covering, Inc., includes a thirty-five (35%) percent interest as a general partner in Holiday Villa East, a 172-bed retirement home located at 1447 17th Street, Santa Monica, California, the legal description of which is:

"Lots M, N, O, and P in Block 157, in the Town of Santa Monica, in the City of Santa Monica, in the County of Los Angeles, as per Map recorded in Book 3, Pages 80 and 81, and in Book 39, Page 45, *et seq.*, of Miscellaneous Records in the Office of the County Recorder of said County."

e. All bank accounts of Diller Floor Covering, Inc., including the account maintained at the National Bank of California, 117 North La Cienega Boulevard, Los Angeles, California 90048, account No. 0001-006282.

f. One hundred percent (100%) of the unimproved real property located in Desert Hot Springs, California, and more particularly described as:

"Lots 13, 14 and 15 of Hot Springs Oasis Unit 1, as shown by the map on file in Book 34, page 39-40 of Maps, in the Office of the

App. 27

County Recorder, of Riverside County, California."

g. An undivided sixty-seven percent (67%) interest as a tenant in common in unimproved real property located in Lancaster, California, and more particularly described as:

"The East Half of the West half, of the Northeast quarter, of Section 18, Township 7 North, Range 12 West, San Bernardino meridian, according to the official plat of said land approved by the Surveyor General on June 19, 1856 *except* the north 30 feet thereof."

h. One hundred percent (100%) interest in a condominium located in Jerusalem, Israel, and more particularly described as:

"Shares Nos. 34347-34841 of Yehuda Hotels, Ltd., standing in the name of Stanley and/or Dorothy Diller, and all right, title, and interest in the residence use rights in apartment Type B, Story 9, in the Jerusalem Plaza Hotel."

2. COMMUNITY PROPERTY AWARDED TO RESPONDENT

The following-described community assets shall be and hereby are awarded to respondent as his sole and separate property:

a. Fifty-percent (50%) interest in Diller and Mayer Company, a limited partnership which owns a 30-unit apartment building located at 1920 Cheremoya Avenue, Los Angeles, California, and more particularly described as:

"Lots 35 and 36 of Hollywood Pineapple Tract in the City of Los Angeles, in the County of Los Angeles, as per Map recorded in Book 9, Page 42 of Maps, in the Office of the County Recorder of said County."

b. Fifty-percent (50%) interest in Diller Mayer Coldwater Company, a limited partnership which itself owns:

(1) A fifty-percent (50%) interest in a 60-unit apartment building located at 5153 Coldwater Avenue, North Hollywood, California, and more particularly described as:

"Lot 1 of Tract 24541, in the City of Los Angeles, in the County of Los Angeles, as per Map recorded in Book 668, Pages 49 and 50 of Maps, in the Office of the County Recorder of said County"; and

(2) A ten-percent (10%) interest in the Simi-Masson Ranch Limited Partnership.

c. That certain real property commonly known as 417-419 South La Brea Avenue, Los Angeles, California, and more particularly described as:

"Lot 21 of Tract 5273, in the City of Los Angeles, County of Los Angeles, as per map recorded in Book 55, Page 52 of maps, in the office of the County Recorder of said county."

d. Fifty-five percent (55%) interest in Diller Flooring Industries, a general partnership which operates a wholesale and retail floor-covering business on the premises located at

417-419 South La Brea Avenue, Los Angeles, California.

e. Sixty percent (60%) of the issued and outstanding common stock of Jedamist Corporation, a California corporation, and all right, title, and interest in and to said corporation and the assets thereof, and all sums due or receivable from said corporation, including its interest in a medical office building located at 1125 South Beverly Drive, Los Angeles, California.

f. Sixty-percent (60%) interest in Jedamist Partnership, a California partnership, and all of Jedamist Partnership's right, title, and interest in and to the medical office building located at 1125 South Beverly Drive, Los Angeles, California, and more particularly described as:

"Lots 10, 11 and 12 of Tract 3535, in the City of Los Angeles, in the County of Los Angeles, as per map recorded in Book 107, Pages 1 to 9 inclusive of maps, in the office of the County Recorder of said County."

g. Forty-percent (40%) interest in DFGE Development Company, a general partnership doing business as Toluca Lake Retirement Villa, a 126-bed retirement home located at 10537 Magnolia Boulevard, North Hollywood, California, and more particularly described as:

"Lots 3, 4, 5, and 6 of Tract 1230, in the City of Los Angeles, County of Los Angeles, as per Map recorded in Book 17, Page 200 of Maps, in the Office of the County Recorder of said County."

h. Thirty-seven percent (37%) interest in WDW Joint Venture, a joint venture which operates Downey Community Health Center, a 198-

bed convalescent hospital and mental health center located at 8425 Iowa Street, Downey, California, and more particularly described as:

"Parcels 1, 6, 7, 8, 9, 10, 11, 12, 13, 14 and 15 in the City of Downey, in the County of Los Angeles, as per map recorded in Book 56, Page 47, in the Office of the County Recorder of said County."

i. The residential condominium unit located at 8963 Burton Way, Unit 201, Los Angeles, California, and more particularly described as:

"An undivided 1/15th interest (Condominium Unit #201) of Condominium Tract 35154, in the City of Los Angeles, County of Los Angeles, as per maps recorded in Book 956 at pages 17-18 of Maps, in the office of the Recorder of said County."

j. All of the issued and outstanding stock of Stanley Diller, Inc., a California corporation, and all right, title, and interest in and to said corporation and the assets thereof, and all sums due or receivable from said corporation.

k. All right, title, and interest in and to the Cadillac automobile presently in the possession of respondent.

l. All of the issued and outstanding stock of Stanley Diller Charitable Foundation, a California nonprofit charitable corporation, and all right, title, and interest in and to said corporation and the assets thereof, including its bank account at the Bank of America, 9021 West Sunset Boulevard, Los Angeles, California, account No. 1343-02742.

3. ASSETS DIVIDED IN KIND

The following-described community assets shall be and hereby are divided and distributed equally between petitioner and respondent:

a. The community estate of the parties herein includes a claim against Robert Ives. There is presently a lawsuit pending on behalf of the community, entitled *Stanley Diller v. D & J Investment Co., et al.*, Los Angeles Superior Court case No. 581 030. Any sums received by reason of said litigation, after deducting reasonable attorneys' fees and costs actually incurred and paid by the parties hereafter, shall be equally divided and distributed between petitioner and respondent, and the Court expressly reserves jurisdiction to effect such division if, as, and when funds are received by reason of said litigation.

b. All community bank accounts, savings accounts, money market accounts, bonds, brokerage accounts, and certificates of deposit not specifically described in this Further Judgment which are in the name of or for the benefit of the community shall be divided and distributed equally between the parties. Each party must forthwith: (1) provide the other with a complete report of all community funds, accounts, and monies in his or her possession or control from October 1, 1987, to the date of entry of this Further Judgment; and (2) each party must forthwith pay to the other one-half (1/2) of the sums in any community bank accounts, savings accounts, money market accounts, bonds, brokerage accounts, certificates of deposit, or any other accounts, including accrued interest. Note:

The respondent's obligation to pay these amounts to petitioner is not included in the equalization note described below at paragraph 9 and is a wholly separate and independent obligation of respondent to petitioner.

Said accounts include, but are not limited to, the following:

(1) Community Stock Brokerage Accounts:

- (a) Drexel Burnham Lambert
Account No.: 47-11032-5
Account Balance (12/31/86): \$0
- (b) Drexel Burnham Lambert
Account No.: 15-06411-6
Account Balance (8/28/87):
\$38,273.91
- (c) Smith Barney
Account No.: 057-450332
Account Balance (3/27/87):
\$6,941.87

(2) Community Bank Accounts:

- (d) National Bank of California
117 North La Cienega Boulevard
Los Angeles, California 90048
Name: Stanley Diller Enterprises
Account No.: 002-760703
Type: Money Market
Amount (10/31/87): \$11,503.89
- (e) Bank of America
9021 West Sunset Boulevard
Los Angeles, California 90069
Name: Stanley Diller
Account No.: 01341-06109

App. 33

Type: Checking

Amount (10/31/87): \$23,560.20

- (f) Bank Leumi
King David Tourist Branch
Jerusalem, Israel
Name: Stanley Diller
Account No.: 092-264-50
Type: Savings
Amount (10/31/87): \$20,977.30
- (g) Bank Hapoalim
6501 Wilshire Boulevard
Los Angeles, California
Name: Stanley Diller
Account No.: 01-405-306
Type: Checking
Amount (10/31/87): \$647.03
- (h) United Mizrahi Bank
727 West Seventh Street
Los Angeles, California
Name: Wilshire Cloverdale
Account No.: 001-301446
Type: Checking
Amount (10/31/87): \$47,032.33

c. Community Stocks

(1) Pursuant to the Court's restraining order of December 7, 1987, and the Court's interim order re attorneys' fees and litigation costs of December 21, 1987, all stocks and other securities owned by the community estate were to have been deposited by respondent into a safe deposit box at the National Bank of California located at 117 North La Cienega Boulevard, Los Angeles, California 90048, and held by the National Bank of California as escrowholder. By this Judgment, all such stocks and securities, as

itemized below, shall be equally divided and distributed between petitioner and respondent, and the time and costs involved in transferring the title of said stocks shall be borne equally by the parties. The Court expressly reserves jurisdiction to effect such division. The stocks are described as follows:

<u>Name of Stock</u>	<u>Number of Shares</u>	<u>Stock No.</u>
Dreyfus Fund, Inc.	131	NU54889
Dreyfus Fund, Inc.	18	NU147872
Dreyfus Fund, Inc.	18	NU148358
Dreyfus Fund, Inc.	19	NU148256
Silvercrest	25	L 03380
Israel Investors Corp.	50	37336
Israel Investors Corp.	10	22449
Emersey Products, Inc.	1,100	D 6520
Gulfstream Aerospace	500	CG 9207
International Game Tech.	200	SFU 18653
Victor Graphics, Inc.	300	SL 10011
Sunset Industries	3	CO 9859
Sunset Industries	5	CO 2293
Sunset Industries	2	CO 3930
Denison Mines, Ltd.	100/200 of 1 share	F 3998
Jim Walter Corporation	2	T 07801
Jim Walter Corp. Prof.	3	MP/03195
Jim Walter Corp. Common	1	NO 10786
Manhattan Fund, Inc.	200	U 115259
Communications Satellite	5	SO 17055
Communications Satellite	5	NY 106348
The Jupiter Corporation	20	HP 5965
The Manhattan Fund, Inc.	12	SDU 17846
The Manhattan Fund, Inc.	200	UL 59036
Fife Corporation	500	OU 07193

<u>Name of Stock</u>	<u>Number of Shares</u>	<u>Stock No.</u>
Fife Corporation	300	OU 4150
National Bank of California	1500	L 790
National Bank of California	200	L 791
National Bank of California	10,500	L 792
National Bank of California	29,800	L 413
National Bank of California	1,000	L 654
National Bank of California	333	L 1650
Butler	not listed	not listed
City National Bank	not listed	not listed
Mack Truck	not listed	not listed

(2) The community owns 43,333 shares of National Bank of California stock described above which shall be equally divided and distributed between petitioner and respondent. The Court expressly reserves jurisdiction to effect the foregoing.

d. Any other bank or brokerage or other accounts, or securities, including savings and loan accounts, bonds, and certificates of deposit, which are in the name of or for the benefit of any community asset shall be forthwith distributed by respondent to the party receiving that community asset, in the amount in said accounts as of January 15, 1988, less proper expenditures and plus income received as to that community asset. Respondent shall provide petitioner with

a complete accounting from October 1, 1987, to the date of entry of this Further Judgment for each such account.

e. The community asset which is comprised of the proceeds from the liquidation of the partnership known as MDW Properties and the corporations known as Centralia Convalescent Center, Inc., and Centralia Manor, Inc. ("MDW/Centralia"). Pursuant to a stipulation and order dated May 15, 1985, all proceeds generated from the sale of MDW/Centralia shall be divided and distributed equally between the parties, as their separate property. Moreover, respondent is hereby ordered forthwith to distribute all funds held in reserve on the account of or for the benefit of MDW/Centralia to its respective partners, including one-sixth ($1/6$) to petitioner. The Court expressly reserves jurisdiction to effect such distribution of the reserve funds.

f. The community owns a 13.153-percent interest in an oil and gas limited partnership known as Leviathan '82 Limited Partnership. Said interest shall be forthwith equally divided and distributed between petitioner and respondent, and the Court expressly reserves jurisdiction to effect the foregoing.

g. The petitioner and respondent shall equally divide any income tax charitable deductions to which the parties may be entitled as a result of the interest in the Stanley Diller Charitable Foundation.

h. The petitioner and respondent shall equally divide any income tax charitable deductions to which the parties may be entitled from

and after 1984 relating or pertaining to the parties' sixty-percent (60%) interest in DKDR, a general partnership which formerly owned real property located at 5750 West Third Street, Los Angeles, California. In particular, if respondent has taken all of such deductions, or more than his share, in connection with federal and/or state income tax returns at any time, he is hereby ordered to forthwith refile and adjust his income tax obligations to permit petitioner to take advantage of one-half (1/2) of said deductions. In addition, the parties shall equally divide any income tax-related deductions resulting from their ownership of an interest in DKDR, including salaries, expenses paid, depreciation, and/or other tax loss. The Court expressly reserves jurisdiction to effect the foregoing.

i. Each party is entitled to and shall forthwith have the benefit of one-half (1/2) of the lax-loss carryforward benefits to which the parties may be entitled, reflected in joint income tax returns filed by the parties at any time. Furthermore, each party is entitled to and shall immediately have the benefits of one-half (1/2) of the income tax losses and deductions attributable to community assets, liabilities, and/or expenses of the parties through the date of distribution of assets pursuant to this Further Judgment. In the event there are any posttrial tax claims or tax liabilities, the parties shall cooperate in good faith, each with the other, to resolve said claims and shall share equally in any liabilities that arise that relate to community property of the parties. The Court expressly reserves jurisdiction to effect the foregoing.

j. Community Bonds Held in the Name of Stanley Diller

Pursuant to the Court's order of December 21, 1987, regarding interim attorneys' fees and litigation costs, the following-described bonds were liquidated, and the proceeds were divided and distributed equally to Selvin and Weiner, A Professional Corporation, and Robinson, Robinson & Robinson, Inc.:

- (1) California Health Facilities Authority
Daniel Freeman Memorial Hospital -
35

Nos.: 4052, 4053, 8741, 8740, 4051,
4049, 4050, 4047, 4048, 4044, 8749,
8750, 8751, 8752, 8744, 8745, 8746,
8462, 8461, 7366, 7367, 8747, 8748,
8742, 8743, 7368, 7369, 8757, 7370,
8755, 8756, 8753, 8754, 4045, 4046

- (2) California Health Facilities Authority
Henry Mayo Newhall Memorial Hos-
pital - 11

Nos.: 2383, 2384, 2385, 2386, 2387,
2388, 2389, 2390, 2391, 2392, 2393

- (3) County of Orange, California - 1
No. 6535

- (4) City of Industry - 10

Nos.: 2157, 2153, 2154, 2155, 2156,
2158, 2159, 2160, 2161, 2261

- (5) City of Richmond - 2

Nos.: 606, 607

- (6) City of San Bernardino - 26
Nos.: 3522, 3523, 2482, 4423, 4422,
2569, 2568, 2491, 2462, 2461, 6843,
6820, 5783, 5727, 5102, 5096, 4599,
4538, 2484, 3524, 6842, 2487, 2485,
2486, 3521, 3307
- (7) California Pollution Control Financing
Authority - 3
Nos.: 818, 819, 820
- (8) City of Palmdale, California - 40
Nos.: 1438 through 1477
- (9) Redevelopment Agency of the City
and County of San Francisco - 3
Nos.: 3681, 3682, 3683
- (10) Redevelopment Agency of the City of
Corona - 30
Nos.: 9718, 9719, 10461, 10462, 10753,
10876, 10891, 10892, 10893, 11149,
17457, 12793, 12792, 12761, 12166,
11168, 11167, 11166, 11148, 11147,
11146, 11145, 11144, 11143, 6559, 5873,
5820, 5819, 5507, 11150

k. Other Community Stocks, Bonds, Certificates of
Deposit

In addition to the foregoing, any other accounts, stocks, bonds, certificates of deposit, or other securities, as to which the community estate has an interest, in addition to those described herein, are to be immediately disclosed, identified, and marshalled by the parties, and equally divided between the parties. Similarly, any dividends, distributions, cash, or stock, or any income from

the stocks, bonds, or other securities owned by the community, wherever located and whenever discovered are to be divided in kind equally between the parties. Any such interest income or other funds received after December 21, 1987, from bonds described in subparagraph (j) above must be paid, in equal shares, to Selvin and Weiner, A Professional Corporation, and to Robinson, Robinson & Phillips, Inc., as part of and in partial satisfaction of the Court's December 21, 1987, interim order for payment of attorneys' fees and costs. The Court expressly reserves jurisdiction to effect the foregoing.

1. Other Community Property

All other community property not specifically described in this Further Judgment, in the possession and control of either party or any other person or entity, including but not limited to any and all accounts in any bank, savings and loan association, securities, brokerage, or other financial or securities institution or entity shall forthwith be accounted for by each party who for the purposes of this subparagraph (l) is acting in a fiduciary capacity for the other and equally divided and distributed between petitioner and respondent. The Court expressly reserves jurisdiction to effect the foregoing.

4. SEPARATE PROPERTY CONFIRMED TO PETITIONER

The following-described assets shall be and hereby are confirmed to petitioner as her sole and separate property:

a. That certain real property commonly known as 144 South Formosa Avenue, Los Angeles, California, and more particularly described as:

"Lot 181 of Tract 5207, in the City of Los Angeles, County of Los Angeles, as recorded in Book 109 at pages 55-56 of Maps, in the office of the Recorder of said County of Los Angeles."

b. All items of jewelry in the possession of petitioner, whether acquired before or after the date of separation.

c. A One Hundred Thousand Dollar (\$100,000) certificate of deposit, standing in the name(s) of Dorothy Diller and/or Arthur Diller, at First Los Angeles Bank, certificate No. B20537, together with all interest thereon.

5. SEPARATE PROPERTY CONFIRMED TO RESPONDENT

The following-described assets shall be and hereby are confirmed to respondent as his sole and separate property:

a. All of his or the community estate's issued and outstanding stock of D.R.W.J., Inc., a California corporation, and all of that entity's right, title, and interest in and to said corporation and the assets thereof, including D.R.W.J., Inc.'s interest in Wilain, Ltd., a California limited partnership, and its interest in a 59-bed skilled-nursing facility located at 1277 North Wilcox Avenue, Los Angeles, California.

b. that certain real property commonly known as 165 South Hudson Avenue, Los Angeles, California, and more particularly described as:

"Real property in the City of Los Angeles, County of Los Angeles, Lot B of Parcel Map 3389, filed in Book 74, at pages 87-88, in the office of the Recorder of said County."

c. That certain real property located at 356 South Rimpau Boulevard, Los Angeles, California, and more particularly described as:

"Lot 6 of Tract No. 5640, in the City of Los Angeles, in the County of Los Angeles, as per map recorded in Book 62, Page 32 of Maps, in the office of the County Recorder of said County."

d. The personal bank account (No. 154-024601), located at First Interstate Bank, Wilshire-Detroit office, 5353 Wilshire Boulevard, Los Angeles, California, in the name of Stanley Z. Diller.

6. DIVISION OF COMMUNITY LIABILITIES

a. Kest Note.

Respondent is the defendant in a lawsuit filed by Sol Kest, entitled *Sol Kest v. Stanley Diller*, Los Angeles Superior Court case No. C 656 693 (the "Kest action"). The Kest action seeks payment of interest and principal on a Two Hundred Thousand Dollar (\$200,000) promissory note which is a community debt. Petitioner has intervened in that action.

A substantial sum has already been paid to Mr. Kest on said note out of community funds. Petitioner has suggested that the transaction may be usurious. Respondent argues that the transaction is not usurious. If petitioner is satisfied that the Kest note is not usurious, said note shall be immediately paid, including principal and interest; each party hereto shall be obligated to pay the Kest note in equal shares. However, if petitioner determines to pursue the *Kest* action, petitioner shall advance the attorneys' fees and costs of defense that may be incurred hereafter. If the final judgment rendered in the *Kest* action results in a determination that the Kest note is not usurious, petitioner shall not be reimbursed for any part of the attorneys' fees or costs incurred by her in connection with the *Kest* action. Petitioner and respondent shall be obligated to equally pay and satisfy the amount of the *Kest* judgment or any settlement reached with Mr. Kest, including court costs and interest, but petitioner alone will be required to pay Court-ordered attorneys' fees resulting in the *Kest* action. On the other hand, if the final judgment in the *Kest* action results in a determination that the Kest note is usurious, respondent shall be obligated to pay not only one-half (1/2) of the judgment thereon, if any, which issues against the community, respondent, and/or petitioner, but respondent shall also be obligated to pay one-half (1/2) of the net litigation costs and attorneys' fees incurred by petitioner (the net amount of litigation attorneys' fees and costs is computed by deducting the fees and costs, if any, which the Court awards against plaintiff Kest and for the defendants in that action). Under these circumstances, petitioner

shall pay the other half of any *Kest* action judgment.

b. Maintenance Charges for Israeli Condominium.

There is presently a dispute existing over maintenance charges incurred in connection with the Israeli condominium (Apartment 9-B, Sheraton Jerusalem Plaza Hotel), for the years 1984 to 1987. Resolution of this dispute shall be under the control of the receiver appointed by this Court in connection with this action, as described hereinbelow. In the event that said maintenance fees are deemed by the receiver, or a court of competent jurisdiction, to be due, owing, and payable, it shall be paid by the receiver, in equal shares, from the petitioner's and respondent's respective receivership accounts, pursuant to the instructions issued to the receiver hereinbelow.

c. Pretrial Discovery Costs.

Petitioner and respondent shall cause the following amounts to be paid forthwith to Beryl Weiner, of Selvin and Weiner, A Professional Corporation, which amounts were incurred in connection with services provided by Lacey Shorthand Reporters (in the amount of \$2,953.95) and Zachary Jackson Copy Service (in the amount of \$579.70): Petitioner shall forthwith pay to Mr. Weiner the amount of \$1,766.82, and respondent shall forthwith pay to Mr. Weiner the amount of \$1,766.83. If said amounts have previously been paid by the community to Lacey Shorthand Reporters and Zachary Jackson Copy Service, then this portion of the judgment shall be deemed to be satisfied upon proof of such payment presented to Mr. Weiner.

d. Unpaid Loans.

The community estate owes the following-described debts to entities in which the community has an interest. Each debt described below shall be paid as provided below:

(1) The community estate owes Diller Floor Covering, Inc., the amount of One Hundred Sixty-Three Thousand Nine Hundred Eighty-Two Dollars (\$163,982), for loans extended to the community prior to and after the date of separation. Inasmuch as Diller Floor Covering, Inc., is now and shall be the separate property of petitioner, respondent shall forthwith pay to petitioner the sum of Eighty-One Thousand Nine Hundred Ninety-One Dollars (\$81,991), which represents one-half (1/2) of the outstanding debt. This sum is not included in the equalization note described hereinbelow at paragraph 9 and is a wholly separate and independent obligation of respondent.

(2) The community estate owes Los Angeles New Hospital Limited Partnership, a limited partnership, One Hundred Sixty Thousand Dollars (\$160,000) for loans extended to the community. Said loans shall be satisfied by the receiver pursuant to the instructions issued to the receiver hereinbelow.

(3) The community estate owes a debt to Brookshire Partners, a general partnership in which the community owns a fifty-one percent (51%) interest. Said debt was incurred in connection with partnership deficits. The receiver appointed by this Court in connection with this action will

ascertain the amount of said debt and dispose of said debt pursuant to the instructions issued to the receiver hereinbelow.

(4) Pursuant to stipulations entered into during trial by petitioner and respondent, the community estate owns a total of ninety-four percent (94%) of the Los Angeles New Hospital partnership: ninety-three percent (93%) through its interest in Diller Active, Inc., and one percent (1%) purchased directly by the community. Respondent paid Five Thousand Dollars (\$5,000) out of his separate-property funds to purchase the one percent (1%) community interest. Therefore, the community shall reimburse respondent in the amount of Five Thousand Dollars (\$5,000) by giving him a credit in connection with the equalization note which respondent is to pay to petitioner (see paragraph 9 below). Said credit is reflected in the amount of the equalization note set forth in paragraph 9 below.

e. Attorneys' Fees, Accountants' Fees, and
Litigation Costs.

By their October 19, 1987, Consent, Waiver and Stipulation, and the order thereon, and by their pleadings, and by their trial briefs, the parties submitted for determination by this Court the matters of the reasonable value of services rendered and costs advanced to petitioner by her attorneys, Selvin and Weiner, A Professional Corporation, and to respondent by his attorneys, Robinson, Robinson & Phillips, Inc.,

and, in addition, the matters of the assessment of attorneys' and accountants' fees and costs, if any, to either party, to their respective attorneys of record, and/or to the community. Civil Code §§ 4370 and 4370.5 additionally grant to this Court the jurisdiction to make awards for payment of attorneys' fees and litigation costs.

The Court has found that the reasonable value of services rendered and costs advanced by Selvin and Weiner, A Professional Corporation, to or on behalf of petitioner, are the sum of One million Seven Hundred Nineteen Thousand, Three Hundred Forty-Seven and 73/100 Dollars (\$1,719,347.73) through January 31, 1988, plus the amount of Forth Nine Thousand Four Hundred Forty Four Dollars (\$49,444.00) for services performed and costs advanced for the period after January 31, 1988, to the date of entry of this Further Judgment.

The Court has also found that the reasonable value for services rendered and costs advanced by Robinson, Robinson & Phillips, Inc., to or on behalf of respondent, are the sum of One Million Two Hundred Sixteen Thousand Six Hundred Seven and 23/100 Dollars (\$1,216,607.23) through February 22, 1988, plus the amount of Twenty One Thousand Six Hundred Fifty Dollars (\$21,650.00) for services performed and costs advanced for the period after February 22, 1988, to the date of entry of this Further Judgment.

By its order of March 9, 1988, as set forth in its Memorandum of Tentative Decision, dated March 9, 1988, and for the reasons set forth in its Memorandum of Tentative Decision and in its Statement of Decision, the Court has determined and hereby orders that the community shall pay all outstanding attorneys' and accountants' fees and litigation costs, as follows:

THEREFORE, IT IS HEREBY FURTHER ORDERED, ADJUDGED, AND DECREED THAT:

(1) In order to satisfy the obligation to Selvin and Weiner, A Professional Corporation, petitioner and respondent, and each of them, out of the community assets awarded to each pursuant to this Further Judgment, are hereby ordered to forthwith pay the balance due and owing as of January 31, 1988, to Selvin and Weiner, A Professional Corporation, which, after all appropriate credits are applied, is the amount of Seven Hundred Thirty-Six Thousand Two Hundred Ninety-Eight and 00/100 Dollars (\$736,298.00), and the sum of Forty Nine Thousand Four Hundred Forty Four (\$49,444.00) to cover attorneys' fees and litigation costs from February 1, 1988, to and including the date of this Further Judgment, or a total of Seven Hundred Eighty Five Thousand Seven Hundred Forty Two Dollars (\$785,742.00), plus interest thereon at the legal rate from the date of entry of this Further Judgment.

(2) In order to satisfy the obligation to Robinson, Robinson & Phillips, Inc., petitioner and respondent, and each of them, out of the community assets awarded to each pursuant to this Further Judgment, are hereby ordered to

forthwith pay the balance due and owing as of February 22, 1988, to Robinson, Robinson & Phillips, Inc., which, after all appropriate credits are applied, is the amount of Six Hundred Fifty-Eight Thousand Eight Hundred Seventy-Five and 00/100 (\$658,875.00), and the sum of Twenty One Thousand Six Hundred Fifty Dollars (\$21,650.00) to cover attorneys' fees and litigation costs from February 23, 1988, to and including the date of this Further Judgment, or a total of Six Hundred Eighty Thousand Five Hundred Twenty Five Dollars (\$680,525.00), plus interest thereon at the legal rate from the date of entry of this Further Judgment.

(3) In order to satisfy the obligation to Arthur Young and Company, petitioner and respondent, and each of them, out of the community assets awarded to them by this Further Judgment, are hereby ordered to forthwith pay to Arthur Young and Co., the sum of One Hundred Twenty-Five Thousand Dollars (\$125,000), plus interest thereon at the legal rate from the date of entry of this Further Judgment.

(4) In order to satisfy the obligation to Ronald Anteau, petitioner and respondent, and each of them, out of the community assets awarded to them by this Further Judgment, are hereby ordered to forthwith pay to Ronald Anteau the sum of Seventy Thousand Dollars (\$70,000), plus interest thereon at the legal rate from the date of entry of this Further Judgment.

(5) In order to satisfy the obligation to Alexandra Ganley, petitioner and respondent, and each of them, out of the community assets awarded to them by this Further Judgment, are

hereby ordered to forth pay to Alexandra Ganley the sum of Thirty-Five Thousand Dollars (\$35,000), plus interest thereon at the legal rate from the date of entry of this Further Judgment.

This Further Judgment shall be and is a lien on each and every community asset awarded to petitioner and respondent pursuant to this Further Judgment, and such lien shall apply to each item of community property awarded to petitioner and respondent pursuant to this Further Judgment, and shall remain a lien on each said asset until all of the above-described attorneys' fees, accountants' fees, and litigation costs have been paid in full.

Notwithstanding anything to the contrary herein, nothing in this Further Judgment shall prevent Selvin and Weiner, A Professional Corporation, and/or Robinson, Robinson & Phillips, Inc., and/or Arthur Young and Co., and/or Ronald B. Anteau, and/or Alexandra Ganley, and each of them, from exercising all rights and remedies afforded to them under the laws of the State of California, including, but not limited to, Code of Civil Procedure §§ 680.010 through 724.260, inclusive, pertaining to the enforcement of payment of monies owed them pursuant to this Further Judgment.

Any amounts actually received by Selvin and Weiner, A Professional Corporation, Robinson, Robinson & Phillips, Inc., Arthur Young and Co., Ronald B. Anteau, and/or Alexandra Ganley, after the date of this Further Judgment, pursuant to this Further Judgment, shall reduce the amount of said liens.

To the extent that assets are available and have been liquidated, the attorneys' fees, accounts' fees, and litigation costs described herein shall be paid pro rata by and through the Court-appointed receiver, pursuant to the instructions issued to the receiver hereinbelow at paragraph 11.

7. OTHER MATTERS

The interest of the community in the Los Angeles New Hospital Limited Partnership, Brookshire Partners, and the Wilshire Cloverdale property, and more particularly described hereinbelow at paragraph 11, are assets in the community estate which shall not be distributed to the parties but shall be transferred to the Court-appointed receiver for administration and disposition, pursuant to the instructions issued to the receiver hereinbelow.

8. SPOUSAL SUPPORT

Pursuant to Civil Code § 4806, it is hereby ordered that neither petitioner nor respondent shall be awarded spousal support at this time. It is further ordered that this Court reserves jurisdiction to make a future spousal-support award to either party, until the death of either party, or the remarriage of the party seeking support.

By this Further Judgment, each party will receive community property sufficient to give her or him proper support. The Court has made an equal distribution of community property that will give each party income in excess of \$20,000 a month. The volatile, uncertain character of the income-producing stability of the property

awarded each party, plus the current large monthly deficit in operating expenses of the parties' Brookshire Partners interest and the constant threat of the Los Angeles New Hospital contingent liabilities, require the Court to reserve jurisdiction without time limits for spousal support for both parties. The parties must understand that it is these reasons plus the factors set forth in Civil Code § 4801 that will be considered by the Court in a future motion for spousal support. It is unlikely that the Court will consider the loss of present income or earnings as a factor in awarding future spousal support if the loss of present income is the result of unreasonable speculative investment risks or unreasonable, improvident, foolish, extravagant, or wasteful dissipation of income-producing resources or of income from such resources.

9. EQUALIZATION PAYMENT

To equalize the division of the community property between petitioner and respondent, respondent shall deliver to petitioner, within seven (7) days of the entry of this Further Judgment, an executed negotiable promissory note in the principal amount of Seven Hundred Fifty-Five Thousand One Hundred Ninety-Five and 00/100 Dollars (\$755,195.00), payable by respondent Stanley Diller to petitioner Dorothy Diller within three years from the date of execution of said note, and bearing interest at the rate of ten percent (10%) per annum, interest only payable monthly. Said note shall be secured by the following:

- a. Real property located at 165 South Hudson Avenue, Los Angeles, California, and more particularly described as:

"Real property in the City of Los Angeles, County of Los Angeles, Lot B of Parcel Map 3389, filed in Book 74, at pages 87-88, in the office of the Recorder of said County";

b. The real property located at 356 South Rimpau Boulevard, Los Angeles, California, and more particularly described as:

"Lot 6 of Tract No. 5640, in the City of Los Angeles, in the County of Los Angeles, as per map recorded in Book 62, Page 32 of Maps, in the office of the County Recorder of said County"; and

c. The respondent's share of the National Bank of California stock described hereinabove at paragraph 3(d).

It is further ordered that the promissory note from respondent to petitioner contain the usual collection and default provisions and that respondent execute security documents, trust deeds, and stock pledges securing said promissory note in the forms approved by this Court.

10. GENERAL PROVISIONS

a. Each of the parties is informed, pursuant to Civil Code § 4800.6 that, although an obligation based upon a contract is ordered assumed by one party as a division of the community property, in the event that the party to whom the obligation was assigned defaults on the debt or obligation, the creditor may have a cause of action against the other party.

b. Neither petitioner nor respondent shall hereafter incur any indebtedness chargeable

against the other or his or her estate nor contract any debt or obligation in the name of the other or in the name of any community asset which is ordered transferred to the other by this Further Judgment; and each party shall indemnify and hold the other harmless from and against any such indebtedness incurred or created by such indemnifying party. Each party shall forthwith surrender to the appropriate issuing company and cancel all credit cards and charge accounts presently outstanding upon which the other would, is, or may become liable.

c. Each of the parties is ordered to forthwith execute all documents and instruments now or hereafter reasonably necessary or convenient to vest the titles and estates in them, respectively, as provided herein, and at any time, and from time to time, each party shall execute all other instruments and do all other things which may be necessary or proper to effectuate the purpose and intent of this Further Judgment. Notwithstanding the failure or refusal of either party to execute any such instrument, this Further Judgment shall constitute a full and complete transfer and conveyance of the properties herein designated as being transferred, conveyed, or assigned by each party.

d. In the event petitioner or respondent, or either of them, individually or in any other capacity, fail timely to comply with their obligations under this Further Judgment, the Clerk of this Court is authorized and ordered to forthwith execute all documents and do all things reasonably necessary to carry out the purposes and intent of this Further Judgment.

e. The Court expressly finds that each of the parties has had the advice of independent counsel of his or her own choosing and has given full and mature thought to the making of all stipulations described by and included in this Further Judgment.

11. RECEIVERSHIP

a. Appointment of Receiver.

Pursuant to this Court's authority under Civil Code § 4380 and Code of Civil Procedure § 564 empowering the Court to appoint a receiver to enforce its judgment under the Family Law Act, the Court hereby appoints Curtis B. Danning of Los Angeles, California, to be the receiver, and he is hereby authorized to take possession of, operate, manage, and perform all duties ascribed to him by this Further Judgment, in connection with the following assets:

(1) All of the issued and outstanding stock of Diller Active, Inc., a California corporation, and all right, title, and interest in and to said corporation and the assets thereof, and all sums due or receivable from said corporation.

(2) The community's interest in the Los Angeles New Hospital Limited Partnership, which consists of a ninety-three percent (93%) interest in said limited partnership owned by and through Diller Active, Inc., a California corporation, and a one percent (1%) interest, as a limited partner, owned by the community. The Los Angeles New Hospital Limited Partnership

formerly owned a hospital-services business, a hospital, and the underlying real property located at 1177 South Beverly Drive, Los Angeles, California, and Diller Active, Inc., is the general partner of said limited partnership.

(3) All assets and liabilities of the Los Angeles New Hospital Limited Partnership, including, but not limited to:

(a) Bonds Held in Escrow at
National Bank of California Pursuant to
Court Orders of December 7, 1987, and
December 21, 1987, Together with Inter-
est and All Other Income Thereon,
Including:

Redevelopment City of San Diego	\$115,000
Port Hueneme	\$100,000
County of San Bernardino	\$100,000
City of Redlands	\$ 80,000
Corona Redevelopment	\$175,000
Corona Redevelopment	\$ 5,000
Metro Water District	\$ 90,000
City of Industry	\$ 50,000
City of Industry	\$ 25,000
San Bernardino Res. MTG Revenue	\$160,000
California Health Facility Valley Presbyterian	\$ 10,000
Santa Margarita Water Note	\$150,000
California Housing Finance Agency Rev.	\$200,000

App. 57

Watsonville Calif. Indus.	\$160,000
Los Angeles California 1985 Home Mortgage	\$150,000
Southern California Public Power	<u>\$ 10,000</u>
Total Face Value	\$1,580,000

(b) Los Angeles New Hospital
Certificates of Deposit Together with
Interest and All Other Income Thereon.
(Values Are As of October 31, 1987):

Mercury Savings	\$105,000
American Savings & Loan	\$200,000
Southwest Savings	\$210,000
Unity Savings	\$200,000
Southern California Savings & Loan	\$200,000
United Mizrahi Bank	\$210,000
Burbank National Bank	<u>\$100,000</u>
Total:	\$1,025,000

(4) Bank accounts in the name of the Los Angeles New Hospital at the National Bank of California located at 117 North La Cienega Boulevard, Los Angeles, California 90048, including checking account No. 002-504561 and a money market account in the name of Los Angeles New Hospital, account number unknown.

(5) All books and records of whatever nature and location pertaining or relating to Los Angeles New Hospital Limited Partnership or Diller Active, Inc.

(c) All Contingent Liabilities of
Los Angeles New Hospital Limited
Partnership, Including:

i) Medicare claim for 1980, for an estimated amount of One Million Six Hundred Thousand Dollars (\$1,600,000);

ii) Medi-Cal claim for 1978, 1979, and 1980, for an estimated amount of Eight Hundred Thousand Dollars (\$800,000);

iii) Lawsuit entitled *Hospital Corporation of America v. Los Angeles New Hospital*, for a claimed One Million Five Hundred Thousand Dollars (\$1,500,000);

iv) Lawsuit entitled *Walter Heller and Co. v. Los Angeles New Hospital*, for a claimed One Hundred Thirty Thousand Dollars (\$130,000);

v) Miscellaneous legal, accounting, consulting, and other fees and costs incurred in connection with the foregoing contingent liabilities, estimated at Two Hundred Thousand Dollars (\$200,000);

vi) Medicare and Medi-Cal claims, for which there have been no audits or the audits are incomplete for the year 1981; and

vii) Respondent's individual claims for compensation for services rendered to or on behalf of Los Angeles New Hospital on or after the date of entry of this Further Judgment.

(4) Community Interest in Brookshire Partners

The community's fifty-one percent (51%) interest in Brookshire Partners, a general partnership that owns a medical office building located at 11525 Brookshire Avenue, Downey, California, and a 252-bed board-and-care facility located at 11500-11510 South Dolan Avenue, Downey, California, and more particularly described as a long-term lease on underlying real property described as:

"Parcels 1, 2, 3, 4 and 5 as shown on Parcel Map No. 14120, in the City of Downey, County of Los Angeles, State of California, as per map recorded in Book 167, pages 15, 16, and 17 of Parcel Maps, in the Office of the County Recorder of said County."

(5) Wilshire-Cloverdale Office Building and Sale Proceeds.

One hundred percent (100%) interest in an office building improvement and assignment of a long-term ground lease in the Wilshire-Cloverdale office building located at 5363-5371 Wilshire Boulevard and 674 Cloverdale Avenue, Los Angeles, California, as to which title is in the name of "Stanley Diller and Dorothy Diller," and the legal description of which is:

"Lots 110 and 111 of Tract 7705, Sheets 1, 2, and 3, in the City of Los Angeles, County of Los Angeles, as per map recorded in Book 89, pages 33, 34, and 35 of Maps in the office of the County Recorder of said County."

The Court has approved the sale of this community property and said sale is now in escrow. Upon the closing of escrow, all of the proceeds of such sale shall be transferred to the possession and control of the Court-appointed receiver. In the event that the presently pending sale is not finalized, the receiver shall forthwith sell said property at the best possible price and terms practicably attainable.

b. Powers, Duties, and Instructions for Receiver.

In addition to the powers, duties, and instructions previously given to the Court-appointed receiver pursuant to this Court's "Memorandum of Tentative of Decision re Judgment on Reserved Issues; Pendente Lite Order Pending Entry of Judgment; Orders on Motions for Fees and Costs," filed herein on March 9, 1988, and in the Court's Statement of Decision, the Court-appointed receiver is hereby authorized and ordered to do the following:

(1) Set up three (3) separate receivership accounts in which income, dividends, interest, proceeds, and escrow funds are placed or deposited. These accounts can be accounting-record accounts, in the receiver's sound discretion, to wit:

(a) The Receiver Management Account: The receiver management account will contain as much of the income and monies for management and receivership administrative costs,

including attorneys' fees and costs, as the receiver, in his sole discretion, determines are necessary from time to time. If the receiver determines that the receiver management account needs additional funds and such funds are not immediately available from the receiver estate, then the receiver may transfer such sums as he deems appropriate into the receiver management account from the petitioner's and/or respondent's receiver accounts.

(b) and (c) Petitioner's Receiver
Account and Respon-
dent's Receiver
Account:

The receiver will establish a petitioner's receiver account and a respondent's receiver account and place in these accounts, in equal sums, all community income and funds received from the receiver's estate, less sums placed in the receiver's management account. The receiver will pay from the petitioner's receiver account and respondent's receiver account all of the community's liabilities, debts, and obligations as set forth in this paragraph 11 of this Further Judgment. The liabilities, debts, and obligations of the community will, in the ordinary course, be equally divided between petitioner and respondent, and one-half (1/2) of each such obligation shall be paid out of petitioner's and respondent's respective accounts. In the event that a community

liability claim is not the same for petitioner and respondent, the receiver shall pay the full amount of such obligation in the amount which this Court has ordered is a community obligation for each party out of or from that party's receiver account. Subsequently, in order to equalize the sums in the petitioner's receiver account and the respondent's receiver account, the receiver shall deposit into the receiver account of the party who then has the lesser sum in his or her account, a sum sufficient to make the accounts equal.

NOTE: The equalization note provided for in paragraph 9 of this Further Judgment *will not* be paid by the receiver from any of these accounts, nor will the receiver pay any debt or obligation except as specifically described in and authorized by this paragraph 11.

(2) The most critical financial problems for the receiver to immediately deal with are the liabilities incurred by the community in connection with the Brookshire Partners' ongoing deficits. The first financial problem for the receiver to attend to is the failure of the community estate to pay its share of past monthly deficits incurred by the Brookshire Partners since December, 1987, or January, 1988. The second financial problem for the receiver to attend to in connection with the Brookshire Partners is the community's share of present and future operating deficits or losses. The receiver shall arrange with the nonparty Brookshire Partners to await the closing of the Wilshire-Cloverdale office

building escrow, which is anticipated to generate funds from which the Brookshire Partners-related obligations can be paid.

(3) The receiver is authorized to sell, forthwith, at the best possible price and upon the best possible terms, all of the community's interest in Brookshire Partners.

(4) The receiver shall forthwith take all steps necessary to distribute all Los Angeles New Hospital Limited Partnership income generated from the bonds and certificates of deposits owned by it. The receiver shall pay six percent (6%) of said income to the nonparty Los Angeles New Hospital Limited Partnership's limited partners, and the balance shall be paid to the receiver's accounts.

Diller Active, Inc.'s distributive share of the income from the Los Angeles New Hospital Limited Partners ninety-three percent (93%) is corporate income to be paid first to Diller Active, Inc., and subsequently distributed by the receiver through that corporate entity to its sole shareholder, the community estate, in the form of distributions and/or dividends to be deposited directly to the receiver's accounts. The community shall receive its one percent (1%) share of the income directly into the receiver's accounts.

It is further ordered that neither petitioner's attorneys, respondent's attorneys, nor the receiver shall have any responsibility, duty, obligation, or liability to the parties if Diller Active, Inc., fails to afford petitioner or respondent protection or indemnification against contingent liabilities of the Los Angeles New

Hospital Limited Partnership entity. If the distribution of income as described hereinabove is a taxable event, the petitioner, the respondent, Diller Active, Inc., and the Los Angeles New Hospital Limited Partnership must pay such tax liability immediately.

Money received from the Los Angeles New Hospital Limited Partnership can be used by the receiver for costs of administration, or for any community obligations specifically described in and authorized by this paragraph 11. Such funds shall not be used to pay for monies owned by respondent to petitioner either on the equalization note or otherwise.

The receiver is authorized to liquidate Los Angeles New Hospital Limited Partnership capital assets to pay Los Angeles New Hospital Limited Partnership liabilities and obligations. The receiver is not authorized to liquidate Los Angeles New Hospital Limited Partnership assets to pay any Brookshire Partners-related deficit sums owned by the community estate, without the written consent of all partners (non-party and party) of the Los Angeles New Hospital Limited Partnership and without a prior Court order.

(5) The next obligations that the receiver shall pay are the sums which this Court has, by this Further Judgment, ordered be paid to Selvin and Weiner, A Professional Corporation, Robinson, Robinson & Phillips, Inc., Arthur Young and Co., Ronald B. Anteau, and Alexandra Ganley, in connection with attorneys' fees, accountants' fees, and litigation costs, as more fully set forth in this Further Judgment. All such attorneys' and accountants' fees and litigation costs

shall be paid pro rata. Except as provided in paragraph (4) above, the receiver is not authorized to liquidate Los Angeles New Hospital Limited Partnership capital assets to pay any such litigation fees and/or costs, or any other community estate obligation, unless or until all contingent liabilities of the Los Angeles New Hospital Limited Partnership have been paid, settled, or otherwise resolved in full. Furthermore, the receiver is not authorized to pay any attorneys' or accountants' fees, or litigation costs, or other community estate obligations until all of the past unpaid monthly assessments of the community to the Brookshire Partners, attributable to the community, have been paid. In no event can any such attorneys' or accountants' fees or litigation costs can be paid if the balance in petitioner's receiver account or respondent's receiver account is less than Seventy-Five Thousand Dollars (\$75,000), which sum shall be a reserve for the community's obligation for future Brookshire Partners-related deficits and/or for either party's income tax exposure, if any, related to gain on the sale of the Wilshire-Cloverdale property or to income distributed through the Los Angeles New Hospital Limited Partnership and Diller Active, Inc.,

(6) The receiver is ordered to resolve the existing dispute between the parties and the Jerusalem Sheraton Plaza Hotel regarding maintenance fees by whatever reasonable means he deems proper, including, if necessary, a lawsuit in Israel which does not require the parties' physical presence nor that of any California witnesses. Upon the receiver's determination or the determination of an authorized court of competent jurisdiction that said sums are due and

owing, the receiver shall pay such charges equally out of the parties' respective receivership accounts. The receiver's ability to pay said maintenance charges is subject to the same limitations as set forth in subparagraph (5) above regarding the payment of attorneys' fees and litigation costs.

(7) All monies and funds not necessary for the receiver's administrative purposes shall be deposited by the receiver and maintained, with interest, at financial institutions, banks, or savings and loan associations which are insured by an agency of the United States Government. The Court hereby designates any such bank or savings and loan association as a proper depository, pursuant to Los Angeles Superior Court Law Department Policy Manual, § 462(b)(5). All assets in the name of the Los Angeles New Hospital Limited Partnership, including bonds, money market accounts, and certificates of deposits, shall continue in the name of that entity, including any renewal or replacement bonds or certificates of deposit, in separate government-insured (guaranteed) financial institutions, banks, and/or savings and loan association accounts.

c. Further Orders to the Receiver

In carrying out the terms of this Further Judgment, the receiver is hereby further ordered to:

(1) Manage the property of the receivership estate, collect all funds due and owing the receivership estate, employ servants, agents, employees, accountants, consultants, and attorneys, and pay all costs

and expenses of the receivership. The receiver may pay the receiver's fees and costs, attorneys', accountants', and consultants' fees and costs, monthly, without further order of the Court, subject to later Court review and approval;

(2) Carry out contracts and collect, pay, compromise, and settle debts and claims for or against the receivership estate;

(3) Defend lawsuits or claims brought against the receivership estate;

(4) Sue for all sums due or owing to the receivership estate, or to recover any of its property;

(5) In general, to make contracts and do any and all things, and to incur the risks and obligations ordinarily incurred by owners, managers, and operators of similar properties and enterprises. No such risk or obligation incurred by the receiver shall be the personal risk or obligation of said receiver but shall be a risk or obligation of the receivership estate;

(6) Except as may be limited hereby, to exercise all powers accorded to a receiver pursuant to the California Code of Civil Procedure;

(7) To hold all monies, subject to further order of the Court, which come into the receiver's possession and which are not expended for any of the purposes herein permitted;

(8) Within thirty (30) days after qualification, said receiver shall file an inventory

of all property which he has taken into possession or under his control pursuant to Court order. If said receiver shall subsequently come into possession or control of additional property or assets, he shall immediately file a supplemental inventory with the Court;

(9) Said receiver, Curtis B. Danning, will take an oath to perform his duties faithfully and shall execute a corporate surety in the sum of Three Million Dollars (\$3 million), undertaking to the State of California for that faithful performance subject to the continuing jurisdiction and orders of this Court;

(10) Upon satisfaction or other disposition of the Los Angeles New Hospital Limited Partnership contingent liabilities and upon completion of all of the receiver's duties under this Further Judgment, or in the event that all assets in the receiver's possession and control have been paid out and there still remain community obligations unpaid, said receiver shall make a final report and accounting to the Court and shall give notice to all parties involved in this action, except dismissed claimants, and notice shall be given to Selvin and Weiner, A Professional Corporation, Robinson, Robinson & Phillips, Inc., Ronald B. Anteau, Alexandra Ganley, and Arthur Young and Co.;

(11) In seeking an allowance of compensation at the time of the hearing for the settlement of the final report and accounting, the receiver's accountings must satisfy

the provisions of Code of Civil Procedure § 528(d); and

(12) The receiver shall disburse all sums, if any, which remain after satisfaction and disposition of all of the liabilities as provided by this Further Judgment. If community assets in the possession and control of the receiver have been exhausted and were used in the receiver's performance of his duties under this Further Judgment, then petitioner and respondent shall be equally responsible and liable for any remaining community debts or other obligations.

12. FURTHER TRIAL ON RESERVED ISSUES

IT IS HEREBY FURTHER ORDERED that trial on the following reserved issues take place in Department 2 of the above-entitled court located at 111 North Hill Street, Los Angeles, California, at 8:30 a.m., on Friday, August 12, 1988, for an additional Further Judgment:

The identification and valuation of the community's and the parties' respective household furniture and furnishings, personal effects, and personal property, including the tea set in petitioner's possession, and the medical equipment presently being stored at 144 South Formosa Avenue, Los Angeles, California; and the award of attorneys' fees and litigation costs in connection with the trial on these reserved issues.

In addition to the foregoing, this Court has and hereby does expressly reserve jurisdiction over the receiver and over the issue of spousal support, as provided hereinabove.

All matters pertaining to this Further Judgment shall continue to be heard by the Judge Robert Fainer. If issues in connection with this Family Law matter remain for resolution after April 11, 1988, Judge Fainer will accept an assignment to hear such matters upon the approval and assignment of the Chair of the Judicial Council and the supervising judge of the Family Law Court of the Central District of Los Angeles.

The Court hereby expressly retains jurisdiction to make other and further orders as may be necessary to carry out the terms and provisions of this Further Judgment and prior Court orders and the stipulations of the parties heretofore entered in this proceeding.

Dated: April 11, 1988 /s/ Robert Fainer
ROBERT FAIRER
Judge of the
Superior Court

PROOF OF SERVICE BY PERSONAL DELIVERY

(In re Marriage of Diller; LASC Case No. D 118 626)

[illegible]

I am employed in the County of Los Angeles, State of California. I am over the age of 18 years and not a party to the within action. My business address is 2029 Century East, Suite 1700, Los Angeles, California 90067-3003.

On April 11, 1988, I served the foregoing document described as:

"FURTHER JUDGMENT ON RESERVED ISSUES"

on the following interested parties in this action by placing a true copy thereof enclosed in sealed envelopes addressed as follows:

I personally caused said envelop to be hand-delivered to Mark P. Robinson, Esq., Robinson, Robinson & Phillips, 4525 Wilshire Blvd., 3rd Floor, Los Angeles, CA 90010-3886.

Executed this 11th day of April, 1988, at Los Angeles, California.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

/s/ Joyce I. Craig
JOYCE I. CRAIG

SERVICE LIST

(In re Marriage of Diller; LASC Case No. D 118 626)

Mark P. Robinson, Esq. (HAND DELIVERED)
ROBINSON, ROBINSON & PHILLIPS, INC.
Third Floor
4525 Wilshire Boulevard
Los Angeles, CA 90010-3886

Ronald Arteau, Esq.
Simke, Chodos, Silberfled (COURTESY, BY MAIL)
& Arteau, Inc.
Suite 9000
6300 Wilshire Boulevard
Los Angeles, CA 90048

App. 72

Michael E. Grodsky, Esq. (COURTESY, BY MAIL)
1145 Crest Drive
Los Angeles, CA 90035-1301

APPENDIX D

§ 4370. Costs and attorneys fees pendente lite; attorneys fees for enforcement of support order

(a) During the pendency of any proceeding under this part, the court may order any party, except a governmental entity, to pay such amount as may be reasonably necessary for the cost of maintaining or defending the proceeding and for attorneys' fees; and from time to time and before entry of judgment, the court may augment or modify the original award for costs and attorneys' fees as may be reasonably necessary for the prosecution or defense of the proceeding or any proceeding related thereto, including after any appeal has been concluded. In respect to services rendered or costs incurred after the entry of judgment, the court may award such costs and attorneys' fees as may be reasonably necessary to maintain or defend any subsequent proceeding, and may augment or modify any award so made, including after any appeal has been concluded. Attorneys' fees and costs within the provisions of this subdivision may be awarded for legal services rendered or costs incurred prior, as well as subsequent, to the commencement of the proceeding. Any order for a party who is not the husband or wife * * * of another party to the proceedings to pay attorneys' fees or costs shall be limited to an amount reasonably necessary to maintain or defend the action on the issues relating to that party.

(b) During the pendency of any proceeding under this part, an application for a temporary order making, augmenting, or modifying an award of attorneys' fees or costs or both shall be made by motion on notice or by an

order to show cause, except that it may be made without notice by an oral motion in open court in either of the following cases:

(1) At the time of the hearing of the cause on the merits * * * .

(2) At any time prior to entry of judgment against a party whose default has been entered pursuant to Section 585 or 586 of the Code of Civil Procedure.

(c) Notwithstanding any other provision of law, absent good cause to the contrary, the court, upon determining an ability to pay, shall award reasonable attorneys' fees to a custodial parent in any action to enforce an existing order for child support.

(d) Notwithstanding any other provision of law, absent good cause to the contrary, the court, upon determining an ability to pay, shall award reasonable attorneys' fees to a supported spouse in any action to enforce an existing order for spousal support.

§ 4370.5. Justness and reasonableness of award by court; considerations; order of payment

(a) The court may make an award of attorneys' fees and costs under this chapter where the making of the award, and the amount of the award, is just and reasonable under the relative circumstances of the respective parties.

(b) In determining what is just and reasonable under the relative circumstances, the court shall take into consideration * * * the need for the award to enable each party, to the extent practical, to have sufficient financial resources to adequately present his or her case, taking into consideration to the extent relevant the circumstances of the respective parties described in subdivision (a) of Section 4801. The fact that the party requesting an award of attorneys' fees and costs has the resources from which he or she could pay his or her own attorneys' fees and costs is not itself a bar to an order that the other party pay part, or all of the fees and costs requested. Financial resources are only one factor for the court to consider in determining how to apportion the overall cost of the litigation equitably between the parties under their relative circumstances.

* * *

(c) The court may order payment of an award from any type of property, whether community or separate, principal or income.

§ 4371. Attorney fees and costs; direct payment; enforcement

When the court orders one of the parties to pay costs and attorneys' fees for the benefit of the other party, such costs and fees may, in the discretion of the court, be made payable in whole or in part to the attorney entitled thereto. An order of the court providing for payment of such costs and fees may be enforced directly by such

attorney in his own name or by the party in whose behalf such order was made, provided that if such attorney has ceased to be such, it shall be a condition of such enforcement, and must appear of record, that such attorney shall have given to his former client or successor counsel 10 days' written notice of his application for such enforcement, and during such period the client may file in such proceeding a motion directed to such former attorney for partial or total reallocation of fees and costs to cover the services and cost of successor counsel, in which event such proceeding shall be stayed until the court has resolved such motion.

